

2001

Utah v. Robert Leon Gardner : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, :
 :
 Plaintiff/Appellee, :
 :
 v. :
 :
 ROBERT LEON GARDNER, : Case No. 20010378-CA
 : Priority No. 2
 Defendant/Appellant. :

BRIEF OF APPELLANT

Appeal from a judgment of conviction for Attempted Theft, a class A misdemeanor, in violation of Utah Code Ann. §§ 76-6-602(1) and 76-4-102 (1999), and Attempted Escape from Official Custody, a class A misdemeanor, in violation of Utah Code Ann. §§ 76-8-309 and 76-4-102 (1999), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable J. Dennis Frederick, Judge, presiding.

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
JURISDICTION AND NATURE OF PROCEEDINGS	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	8
ARGUMENT	
POINT. <u>THE TRIAL COURT COMMITTED REVERSIBLE ERROR</u> <u>WHEN IT SENTENCED APPELLANT IN ABSENTIA TO THE</u> <u>STATUTORY MAXIMUM, WITH THE SENTENCES TO BE RUN</u> <u>CONSECUTIVELY, WITHOUT ALLOWING ANY INPUT FROM</u> <u>THE PARTIES.</u>	9
A. THE TRIAL JUDGE VIOLATED DUE PROCESS AND UTAH R. CRIM. P. 22 WHEN HE SENTENCED MR. GARDNER TO THE MAXIMUM SENTENCE WITHOUT CONSIDERING RELEVANT AND RELIABLE INFORMATION AND WITHOUT AFFORDING THE PARTIES THE OPPORTUNITY TO SPEAK AT SENTENCING.	10
B. THE TRIAL COURT COMMITTED FURTHER ERROR BY IMPOSING CONSECUTIVE SENTENCES WITHOUT CONSIDERING THE FACTORS LISTED IN SECTION 76-3-401(4).	15
C. THE TRIAL COURT VIOLATED DUE PROCESS AND UTAH R. CRIM. P. 22 BY SENTENCING GARDNER IN ABSENTIA.	18

	<u>Page</u>
1. <u>The Trial Court Erred in Concluding that Mr. Gardner Was Voluntarily Absent.</u>	18
2. <u>Mr. Gardner Did Not Knowingly Waive His Right to Presence.</u>	21
3. <u>The Public Interest Did Not Require that Mr. Gardner Be Sentenced in Absentia.</u>	21
CONCLUSION	23
Addendum A: Judgment	
Addendum B: Transcript of sentencing hearing	
Addendum C: Text of relevant rules and constitutional provisions	
Addendum D: Findings of Fact and Conclusions of Law	

TABLE OF AUTHORITIES

Page

CASES

<u>Smith v. Mann</u> , 173 F.2d 73 (2d Cir. 1999)	22
<u>State v. Anderson</u> , 929 P.2d 1107 (Utah 1996)	18, 22
<u>State v. Bird</u> , Case No. 20010169-CA	3
<u>State v. Brooks</u> , 908 P.2d 856 (Utah 1995)	4
<u>State v. Bullock</u> , 791 P.2d 155 (Utah 1989), <u>cert. denied</u> , 497 U.S. 1024 (1990)	4
<u>State v. Dunn</u> , 850 P.2d 1201 (Utah 1993)	4
<u>State v. Eldredge</u> , 773 P.2d 29 (Utah 1989)	4
<u>State v. Fettis</u> , 664 P.2d 208 (Ariz. 1983)	21
<u>State v. Galli</u> , 967 P.2d 930 (Utah 1998)	2, 5, 15-17
<u>State v. Houtz</u> , 714 P.2d 677 (Utah 1986)	18, 19
<u>State v. Howell</u> , 707 P.2d 115 (Utah 1985)	11
<u>State v. Irwin</u> , 924 P.2d 5 (Utah App. 1996)	5
<u>State v. Johnson</u> , 856 P.2d 1064 (Utah 1993)	4, 11-13
<u>State v. Labrum</u> , 925 P.2d 937 (Utah 1996)	4
<u>State v. Payne</u> , Case No. 20000497-CA	3
<u>State v. Rogers</u> , Case No. 20000812-CA	3, 4

	<u>Page</u>
<u>State v. Samora</u> , Case No. 20000884-CA	3
<u>State v. Strunk</u> , 846 P.2d 1297 (Utah 1993)	16
<u>State v. Vicente</u> , Case No. 20000955-CA	3
<u>State v. Wanosik</u> , 2001 UT App 241	2-4, 8, 9, 11, 12, 15, 17-22
<u>United State v. Fontanez</u> , 878 F.2d 33 (2d Cir. 1989)	22
<u>United States v. McPherson</u> , 421 F.2d 1127 (D.C. Cir. 1969)	21
<u>United States v. Turner</u> , 532 F. Supp. 913 (N.D. 1982)	21

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

Utah Code Ann. § 76-3-401 (1999)	1, 8, 14-18
Utah Code Ann. § 76-4-102 (1999)	1
Utah Code Ann. § 76-6-602(1) (1999)	1
Utah Code Ann. § 76-8-309 (1999)	1
Utah Code Ann. § 78-2a-3(e) (1996)	1
Utah R. Crim. P. 22	1-5, 8, 10-13, 15, 17, 18
U.S. Const. amend. XIV	5
Utah Const. art. I, § 7	5
Utah Const. art. I, § 12	5

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JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from judgment of conviction for Attempted Theft, a class A misdemeanor, in violation of Utah Code Ann. §§ 76-6-602(1) and 76-4-102 (1999), and Attempted Escape from Official Custody, a class A misdemeanor, in violation of Utah Code Ann. §§ 76-8-309 and 76-4-102 (1999). R. 41-2. Third District Court Judge J. Dennis Frederick entered judgment of conviction on March 30, 2001. A copy of the judgment is in Addendum A. This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(e) (1996).

STATEMENT OF THE ISSUE, STANDARD OF REVIEW, PRESERVATION

Issue. Whether the trial court violated due process, Appellant's right to appear and defend, Utah R. Crim. P. 22 and Utah Code Ann. § 76-3-401(4) (1999) when it sentenced Appellant in absentia consecutively to the statutory maximum sentences without affording defense counsel or the state the opportunity to speak at sentencing?

Standard of Review. The issue of whether the trial court properly proceeded in sentencing Mr. Gardner in absentia involves a question of law which is reviewed for correctness. State v. Wanosik, 2001 UT App 241, ¶8. This Court also reviews for correctness the issue of whether the trial court violated Utah R. Crim. P. 22(a) and due process in sentencing Mr. Gardner without affording counsel the opportunity to address sentencing and without basing the sentencing decision on reliable and relevant information. Wanosik, 2001 UT App 241, ¶9. The issue of whether the judge properly imposed consecutive sentences is reviewed for an abuse of discretion. State v. Galli, 967 P.2d 930, 938 (Utah 1998) (holding that trial judges abused their discretion in ordering consecutive sentences by failing to give proper consideration to statutory factors which are to be considered in determining whether to impose consecutive sentences).

Preservation. Neither defense counsel nor the prosecutor was afforded the opportunity to present information relevant to sentencing or to address the issue of whether sentencing in absentia was appropriate. R. 67[2]:1-2¹; see Addendum B containing transcript of sentencing hearing. Instead, Judge Frederick announced that Appellant was not present and that the judge intended to proceed in absentia, over

¹ The record consists of a single volume of transcript which contains the transcripts of the plea hearing and sentencing. Part 1 of that transcript, the plea hearing held on February 13, 2001, is designated R. 67[1] followed by internal page cites. Part 2 of the transcript, the March 30, 2001 sentencing, is designated R. 67[2], followed by internal page cites.

defense counsel's objection. R. 67[2]:1.² The trial judge's recognition of defense counsel's objection preserved this issue for review. Wanosik, 2001 UT App. 241, ¶¶32-36 (Utah R. Crim. P. 22(a) places "affirmative obligation on the trial court to extend the opportunity to be heard" regardless of whether counsel makes a request to be heard; Due Process requires that the trial judge base the sentencing decision on reliable and relevant information).

Additionally, the trial court entered findings of fact and conclusions of law on the issue of whether it could proceed in absentia. This trial judge has sentenced in absentia a number of other defendants, some of whom have cases which have been appealed. See e.g. State v. Payne, Case No. 20000497-CA ; State v. Wanosit, 2001 UT App 241; State v. Samora, Case No. 20000884-CA; State v. Rogers, Case No. 20000812-CA; State v. Vicente, Case No. 20000955-CA; State v. Bird, Case No. 20010169-CA. Because the trial judge has repeatedly considered this issue³, acknowledged Appellant's objection,

² Judge Frederick did not allow counsel to state their appearances prior to proceeding with sentencing. After the judge had sentenced Mr. Gardner, defense counsel clarified that he was not counsel of record and instead was appearing on behalf of counsel of record. Defense counsel began to make a record and was cutoff by the judge. R. 67[2]:2.

³ At sentencing in State v. Vicente, Case No. 20000955-CA, held on September 22, 2000, Judge Frederick stated, "this is yet another sentencing on which we have neither an appearance of the defendant or a report," then sentenced Mr. Vicente in absentia to the statutory maximum sentence. (R. 67[2]:1, Case No. 20000955-CA). On that same day, Judge Frederick sentenced Manuel Samora, Case No. 20000884-CA, in absentia to the statutory maximum sentence. Judge Frederick sentenced Tara Rogers and Jon Hamling in absentia to the statutory maximum on August 4, 2000. He noted Hamling's objection,

and made findings of fact and conclusions of law, the issues raised in this appeal are properly preserved for appellate review.⁴

Even if the issue had not been preserved below, this Court can review the claims in this case pursuant to Utah R. Crim. P. 22(e). Wanosik, 2001 UT App 241, ¶28 n. 11; State v. Brooks, 908 P.2d 856, 860 (Utah 1995). Appellant need not show plain error or exceptional circumstances because ““rule 22(e) [of the Utah Rules of Criminal Procedure] permits the court of appeals to consider the legality of the sentence even if the issue is raised for the first time on appeal.”” Wanosik, 2001 UT App 241, ¶28 n. 11 (quoting Brooks, 908 P.2d at 860).⁵

and Rogers filed a motion to correct an illegal sentence. See Brief of Appellant in State v. Rogers, Case No. 20000812-CA at 3. All of these sentencings occurred prior to the sentencing hearing in this case and demonstrate that the trial judge was well aware of the legal objections to the procedure he followed.

⁴ 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, claiming error on appeal. State v. Eldredge, 773 P.2d 29, 36 (Utah 1989); 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 defense counsel was not afforded the opportunity to object, and the trial judge reviewed the issue of whether to proceed in absentia and entered findings and conclusions, both purposes were met. Accordingly, the issue was properly preserved for appeal.

⁵ Although Mr. Gardner need not show plain error or exceptional circumstances, his claim nevertheless could be reviewed under either of those doctrines. Plain error occurs when (1) an error was made, (2) the error was obvious, and (3) the error prejudiced the defendant. State v. Dunn, 850 P.2d 1201, 1208-09 (Utah 1993). The errors in failing to conduct a full sentencing hearing were obvious under due process, Utah R. Crim. P. 22(a) and State v. Johnson, 856 P.2d 1064, 1071 (Utah 1993). The error in imposing

TEXT OF RELEVANT RULES AND CONSTITUTIONAL PROVISIONS

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

Utah R. Crim. P. 22;

Utah Const. art. I, § 7;

Utah Const. art. I, § 12;

U.S. Const. amend. XIV.

STATEMENT OF THE CASE

In an Information filed February 1, 2001, the state charged Defendant/Appellant, Robert Leon Gardner (“Appellant” or “Mr. Gardner”), with retail theft, a third degree felony, and escape, a third degree felony. R. 6-7. On February 13, 2001, Appellant pled guilty before Third District Court Judge Randall Skanchy to shoplifting and attempted escape from official custody, both class A misdemeanors. R. 20-21. Judge Skanchy ordered a presentence report and scheduled sentencing for March 30, 2001, before Third District Court Judge J. Dennis Frederick. R. 22. As part of the plea bargain, the state

consecutive sentences without considering the statutory factors was obvious under State v. Galli, 967 P.2d 930, 938 (Utah 1998). The obvious error prejudiced Mr. Gardner because he was not given the opportunity to present information relevant to sentencing and instead received the maximum consecutive sentence on each charge. R. 41-42.

Exceptional circumstances also require review. State v. Irwin, 924 P.2d 5, 11 (Utah App. 1996). When a trial judge does not afford counsel the opportunity to present information relevant to sentencing, does not conduct a full and fair sentencing hearing, and proceeds in absentia, a procedural anomaly occurs since the process due at sentencing has not been followed. See id. Without appellate review, the significant violation of Due Process, Rule 22 and the right to presence which occurred in this case would go unchecked. Since the trial judge had the obligation to conduct a full hearing with Mr. Gardner present, exceptional circumstances would require that issue be reviewed even if it otherwise were not properly before the Court.

agreed to recommend concurrent sentences. R. 31.

On March 28, 2001, after Appellant did not appear at Adult Probation and Parole for preparation of a presentence report, Judge Frederick issued an arrest warrant. R. 36.

On March 30, 2001, Judge Frederick sentenced Mr. Gardner to the maximum one-year sentence on each conviction and ordered that the sentences be served consecutively.

R. 41-42. Judge Frederick entered Findings of Fact and Conclusions of Law on April 5, 2001. R. 43-44. See Addendum D.

On April 8, 2001, Mr. Gardner was booked in to the Salt Lake County Jail. R. 49.

STATEMENT OF THE FACTS

According to the probable cause statement in the Information, on January 29, 2001, Mr. Gardner took some merchandise, including a bicycle and two CD players, from Shopko without paying for the items. R. 7. After Mr. Gardner was placed under arrest, the officer transported him to Rocky Mountain Medical Center for x-rays because Mr. Gardner “had a noticeable abrasion on his forehead and complained that his ribs hurt[.]” R. 7. The officer waited in an area outside the room. R. 7. When the technician arrived to take the x-rays, Mr. Gardner had left. R. 7-8.

As part of the plea bargain, the state agreed to recommend concurrent sentences. R. 31. After Mr. Gardner pled guilty, Judge Skanchy ordered a presentence report and scheduled a sentencing date for “March 30, 8:30, Judge Frederick.” R. 67[1]:4. Judge Skancy did not tell Mr. Gardner on the record that he needed to go to Adult Probation

and Parole (“AP&P”) for preparation of a presentence report. R. 67[1]:1-4. The district court file contains a referral form indicating that the defendant must report to AP&P for preparation of a presentence report. R. 22. Although the referral form lists the date scheduled for sentencing, it does not give a deadline for appearing at AP&P. R. 22. Judge Skanchy also did not tell Mr. Gardner that he was required to appear at sentencing and that if he did not appear, he would be sentenced in absentia. R. 67[1].

On March 23, 2001, AP&P sent Judge Frederick a letter stating that Mr. Gardner had not made an appointment with the agency as of that date. R. 33. Judge Frederick revoked Mr. Gardner’s pretrial release and issued an arrest warrant. R. 36.

On March 30, 2001, Judge Frederick sentenced Mr. Gardner in absentia to the statutory maximum of one year on each count, and ordered that the sentences be served consecutively. R. 39-40. Judge Frederick did not afford either attorney the opportunity to speak regarding sentencing. R. 67[2]. Without giving either lawyer the opportunity to state his appearance or speak, Judge Frederick took note of the fact that counsel would object, then imposed sentence. R. 67[2]:1-4. After the judge had imposed sentence, defense counsel, who was covering the hearing for counsel of record, stated:

MR. SIMMS: Your honor, just to clarify for the record. Clayton Simms on behalf of Mr. Bevan Corry for Mr. Gardner. Maybe it’s possible that Mr. Gardner had contacted counsel but I’m thinking it’s (inaudible).

THE COURT: Right.

MR. SIMMS: And no contact--

THE COURT: I understand you were caught a little bit short here but anything is possible. I think we can only assume that him having both written and oral notice on more than one occasion and failed to follow through that he is not here by choice. If something knew[sic] turns up then I'll be glad to consider it.

R. 67[2]:2.

Mr. Gardner was booked into jail on April 8, 2001, where he continues to serve the sentence at issue in this appeal. R. 48-49.

SUMMARY OF THE ARGUMENT

The trial judge violated Utah R. Crim. P. 22 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 on the failure to appear without considering the nature and circumstances of the crime, defendant's background or society's interests and without affording defense counsel the opportunity to present information relevant to sentencing violates the rule and due process and requires a new sentencing hearing. This Court's recent decision in Wanosik, 2001 UT App 241, ¶¶28-36.

The trial judge further violated due process and Utah R. Crim. P. 22 as well as Utah Code Ann. § 76-3-401 by imposing consecutive sentences without considering "the gravity and circumstances of the offenses and the history, character and rehabilitative needs of the defendant." Utah Code Ann. § 76-3-401(4) (1999). A consideration of the

appropriate circumstances demonstrates that consecutive sentences should not be imposed in this case.

The trial judge also violated due process, the right to presence, and the Rules of Criminal Procedure by sentencing Mr. Gardner in absentia. The trial judge incorrectly assumed that Mr. Gardner had voluntarily absented himself based solely on Mr. Gardner's absence at sentencing. The trial court's analysis of the voluntariness issue was almost identical to the analysis made in Wanosik, which this Court concluded was error. Unlike Wanosik, however, the error in this case was harmful. See Wanosik, 2001 UT App 241, ¶25.

ARGUMENT

POINT. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT SENTENCED APPELLANT IN ABSENTIA TO THE STATUTORY MAXIMUM, WITH THE SENTENCES TO BE RUN CONSECUTIVELY, WITHOUT ALLOWING ANY INPUT FROM THE PARTIES.

Judge Frederick began the sentencing hearing as follows:

THE COURT: State of Utah versus Robert Leon Gardner, Case Number CR01634. Is Mr. Robert Gardner in the courtroom or anyone in his behalf? That's what I assumed. He didn't appear at AP&P. A warrant has been issued for his arrest. No bail determined forthwith and I suspect when he is back with us, Mr. Corry [defense counsel of record] will be the first to know.

R. 67[2]:1.

Without affording either party the opportunity to make a statement relevant to sentencing, the judge proceeded to impose sentence. R. 67[2]:2. Despite the fact that the

prosecutor agreed to recommend concurrent sentences, Judge Frederick imposed the maximum jail time for each conviction and ordered that the sentences be served consecutively. R. 67[2]:2.

THE COURT: . . . I believe what I will do today is proceed with the sentencing in absentia, over your objection, of course. Mr. Gardner previously appeared and entered pleas of guilty to two separate Class A Misdemeanor crimes of attempted retail theft and attempted escape from official custody. A presentence report had been ordered based upon that plea and he was ordered to appear before this Court today for sentencing and to go directly to AP&P for the preparation of the report. He failed to do so. I will, therefore, conclude that his failures to appear and failures to contact counsel and this Court are indicative of an intentional absentiong himself from these proceedings and will find that he has accomplished that.

I will order that he be committed to the Adult Detention Center for one year on each of the two separate Class A Misdemeanor charges and that those terms of one year each are to be served consecutively and not concurrently. The warrant that I have heretofore issued for his arrest will remain in affect [sic] and upon his arrest, I'm sure he'll be in touch, counsel.

At this point, Mr. Simms clarified that he was covering for counsel of record, Bevan Corry, and apparently suggested that Mr. Gardner may have contacted counsel of record. R. 67[2]:2. The prosecutor thereafter prepared findings and a conclusion which focused on the voluntariness of Mr. Gardner's failure to appear. R. 43-44.

A. THE TRIAL JUDGE VIOLATED DUE PROCESS AND UTAH R. CRIM. P. 22 WHEN HE SENTENCED MR. GARDNER TO THE MAXIMUM SENTENCE 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."

State v. Howell, 707 P.2d 115, 118 (Utah 1985); see also Johnson, 856 P.2d at 1071

(state and federal due process protections which are applicable to sentencing require that judge make sentencing decision based on reliable and relevant information); Wanosik, 2001 UT App 241, ¶¶34-36 (vacating sentence where record fails to show that trial judge relied on relevant and reliable information in assessing sentence). A sentence which is not based on reliable and relevant information violates due process. See id., ¶¶34-36 (vacating sentence where record did not show that sentence was based on reliable and relevant information).

Utah R. Crim. P. 22(a) requires sentencing judges to give both the defendant and the prosecutor an opportunity to present any information which might be material to sentence. Wanosik, 2001 UT App 241, ¶32. 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 insure 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 the parties the opportunity to present information relevant to sentencing.

Wanosik, 2001 UT App 241, ¶32. While Rule 22(a) mandates that the trial judge give the parties the opportunity to speak at sentencing, due process as outlined in Johnson, 856 P.2d at 1071, requires that any sentence imposed by a trial judge be based on reliable and relevant information. Working together, Rule 22(a) and due process require a trial judge to make sure that a full and fair sentencing hearing which meets due process requirements occurs.

In Wanosik, this Court held that the trial judge violated due process and Utah R. Crim. P. 22(a) under circumstances which are almost identical to the circumstances in this case. Wanosik, 2001 UT App 241, ¶¶28-36. In both cases, the trial court noted the defendant's absence, then sentenced the defendant in absentia to the statutory maximum without affording counsel the opportunity to address sentencing or otherwise conducting a full sentencing hearing. Id.

After concluding that the sentencing procedure followed in Wanosik violated Due Process and Utah R. Crim. P. 22(a), this Court conducted a harmless error review.

Wanosik, 2001 UT App 241, ¶¶26 , 36. This Court concluded that the error in Wanosik was not harmless because:

Had either defense counsel or the prosecutor been given a chance to address AP&P's recommendation that Wanosik be sentenced to 20 days in jail with credit for time served and that he then be committed to a substance abuse treatment program, the sentencing outcome for Wanosik may well have been more favorable than the maximum sentences imposed by the trial court. Thus, we vacate Wanosik's sentences and remand for resentencing.

Wanosik, 2001 UT App 241, ¶¶33, 36.

While Mr. Gardner maintains that the Due Process and Rule 22(a) violations which occurred in this case require reversal regardless of whether prejudice is apparent in a review of the record⁶, a review of the record nevertheless demonstrates harm from the trial court's failure to afford counsel the opportunity to present information relevant to sentencing. The prosecutor was willing to recommend concurrent rather than consecutive sentences. R. 31. This recommendation suggests that mitigating circumstances exist which convinced the prosecutor that Mr. Gardner should not receive consecutive sentences. At the very least, had the judge allowed the parties to address sentencing, he would have heard this recommendation and, in all likelihood, not imposed consecutive sentences.⁷

⁶ Where a trial court fails to base sentence on reliable and relevant information, a new sentencing hearing is required regardless of whether the record demonstrates prejudice. See Johnson, 856 P.2d at 1071. This makes sense since in circumstances where the judge has not afforded the parties the opportunity to present relevant information, the record may not contain information which would demonstrate harm. If a showing of prejudice were required, a trial court could commit flagrant constitutional and statutory error by not allowing the defendant to present relevant information then have the unlawful sentence upheld because the record did not disclose relevant information suggesting that the defendant might have received a better sentence if he had been allowed to present information. The better approach is to require resentencing regardless of whether the record demonstrates prejudice when due process and Rule 22(a) are violated as they were in this case.

⁷ Judge Frederick was not present at the plea hearing and therefore did not hear any discussion of this recommendation. While the plea affidavit indicates that the state agreed to recommend concurrent sentences (R. 31), an oral recommendation carries more weight not only because it insures that the judge is aware of the recommendation, but also the recommendation and the reasons for the recommendation can be discussed.

Additionally, the record demonstrates that the theft and escape occurred as part of a single criminal episode. Trial courts often impose concurrent rather than consecutive sentences when the crimes are part of the same criminal episode. In fact, the circumstances of the offenses, which includes a consideration of whether the offenses are part of the same episode, is one of the factors trial judges are required to consider in deciding whether to impose concurrent or consecutive sentences. Utah Code Ann. § 76-3-401(4) (1999).

Moreover, a consideration of the gravity and circumstances of the crimes demonstrates that Mr. Gardner should have been sentenced concurrently and may well have been placed on probation after serving some jail time if a full sentencing hearing had been conducted. The crimes with which Mr. Gardner was charged were a simple shoplifting and escape after being arrested for the shoplifting. Neither crime involved the use of weapons or violence. The shoplifting was elevated to third degree felony because of the value of the items (a bicycle and two compact disc players). The attempt to escape was made after Mr. Gardner was arrested on the theft and taken to an emergency room for treatment; he merely slipped out of the treatment room.

Additionally, Mr. Gardner had been released to Pretrial Services with a recommendation for drug treatment. R. 30. This indicates that Mr. Gardner was amendable to treatment and probation rather than a statutory maximum sentence.

While punishment for the two class A misdemeanors to which Mr. Gardner pled

guilty was appropriate, imposition of the statutory maximum coupled with consecutive service of those sentences was not. Had the judge been fully aware of the circumstances, “the sentencing outcome for [Mr. Gardner] may well have been more favorable than the maximum [consecutive] sentences imposed by the trial court.” Wanosik, 2001 UT App 241, ¶33.⁸

B. THE TRIAL COURT COMMITTED FURTHER ERROR BY IMPOSING CONSECUTIVE SENTENCES WITHOUT CONSIDERING THE FACTORS LISTED IN SECTION 76-3-401(4).

In addition to violating due process and Rule 22(a) by failing to conduct a full and fair sentencing hearing, the trial judge further violated due process as well as Utah Code Ann. § 76-3-401(4) (1999) by imposing consecutive sentences without considering the factors set forth in section 76-3-401. See Galli, 967 P.2d at 938 (holding that trial judges abused their discretion in imposing consecutive sentences). Utah Code Ann. § 76-3-401(4) requires that a trial judge “consider the gravity and circumstances of the offenses and the history, character, and rehabilitative needs of the defendant in determining

⁸ This claim was preserved by the trial court’s acknowledgment of defense counsel’s objection. Additionally, Utah R. Crim. P. 22(e) allows this Court to consider the illegality of this sentence even if the issue were raised for the first time on appeal. See Wanosik, 2001 UT App 241, ¶28, n. 11. Moreover, this error can be reviewed under the plain error doctrine; the error was obvious under Galli and prejudiced Mr. Gardner since the judge imposed consecutive sentences despite the recommendation for concurrent sentences. Finally, the error can be reviewed under the exceptional circumstances doctrines since trial courts could otherwise commit egregious error in sentencing which may be upheld under the harmless error doctrine because counsel was not allowed to present information relevant to the harmlessness analysis.

whether to impose consecutive sentences.” Utah Code Ann. § 76-3-401(4) (1999).

““The statute . . . favors concurrent sentences.” Galli, 967 P.2d at 938 (quoting State v. Strunk, 846 P.2d 1297, 1301 (Utah 1993)).

In this case, the trial court did not consider the statutory factors in determining whether to impose consecutive sentences. Instead, the imposition of consecutive sentences appears to be based on Mr. Gardner’s nonappearance at sentencing. As Galli demonstrates, imposing consecutive sentences on this factor alone violates section 76-3-401(4). In addition, the trial court’s failure to afford the parties an opportunity to address sentencing resulted in a violation of section 76-3-401(4) because the trial court did not have access to information on these factors.

Additionally, application of the factors set forth in section 76-3-401(4) demonstrates that the trial court abused its discretion in imposing consecutive sentences. First, the gravity and circumstances of the crimes demonstrate that concurrent rather than consecutive sentences should be imposed. Both charges arose out of the same criminal episode. Neither involved violence or the use of a weapon. Mr. Gardner removed items including a bicycle from a store. This elevated the degree of the theft charged. The escape involved slipping out of a room while waiting for medical help. Because these crimes were not aggravated and were part of the same criminal episode, the gravity and circumstances of the crimes weigh in favor of concurrent sentences. R. 31.

Although the record includes little information about Mr. Gardner's history, character and rehabilitative needs, that which is known weighs in favor of concurrent sentences. The state was willing to recommend concurrent sentences. This suggests that concurrent sentences were warranted by Mr. Gardner's background. In addition, Mr. Gardner was released to Pretrial Services and ordered to take "standard drug classes" after he pled guilty. R. 32. This suggests that Mr. Gardner was amenable to supervision and would benefit from drug treatment. Given the fact that concurrent sentences are favored and the information in the record weighs in favor of concurrent sentences, the trial court abused its discretion in imposing consecutive sentences.

As was the case with Mr. Gardner's due process and Rule 22(a) claim, this claim that the trial judge erred in imposing consecutive sentences was preserved by the trial judge's acknowledgment of defense counsel's objection and his failure to afford counsel the opportunity to speak regarding the sentence which should be imposed.

Additionally, even if the issue had not been preserved, the error can be reviewed pursuant to Rule 22(e) since it involves imposition of an illegal sentence. See Wanosik, 2001 UT App 241, ¶28, n. 11 (court of appeals can consider legality of a sentence where the issue is raised for the first time on appeal).⁹

⁹ The error could also be considered under the doctrines of plain error and exceptional circumstances. The error in failing to properly consider the factors set forth in section 76-3-401(4) was obvious under Galli and the statute; it prejudiced Mr. Gardner since the trial judge imposed consecutive sentences without considering relevant factors and in the face of a record which demonstrated that concurrent sentences should be

In this case where the trial court did not afford counsel the opportunity to present information relevant to sentencing, failed to conduct a full and fair sentencing hearing, failed to base the sentence on relevant and reliable information, and failed to consider the factors set forth in section 76-3-401 (4), the trial court erred in imposing consecutive sentences. Accordingly, the sentences must be vacated.

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

The trial court also violated Utah R. Crim. P. 22, due process and the Article I, section 12 right to presence by sentencing Mr. Gardner in absentia. See Wanosik, 2001 UT App 241, ¶¶19-25; State v. Anderson, 929 P.2d 1107, 1109-10 (Utah 1996). Because the right to presence at sentencing is constitutionally guaranteed, the trial judge may not proceed in absentia unless the defendant knowingly and voluntarily waives the right to presence.

1. The Trial Court Erred in Concluding that Mr. Gardner was Voluntarily Absent.

“[A] trial court may not assume a defendant’s knowing absence is voluntary, but rather is required to determine whether a defendant’s absence is in fact voluntary.”

Wanosik, 2001 UT App 241, ¶19 (citing State v. Houtz, 714 P.2d 677, 678 (Utah 1986) (*per curiam*)). “[V]oluntariness may not be presumed by the trial court.” Wanosik,

imposed. Additionally, exceptional circumstances require review since the trial judge’s failure to afford the parties the opportunity to present information relevant to sentencing precluded the existence of a complete record regarding factors relevant to sentencing.

2001 UT App 241, ¶21 (quoting Houtz, 714 P.2d at 678). Instead, “an inquiry into the defendant’s ability to be at the proceeding is required.” Wanosik, 2001 UT App 241, ¶21.

This Court outlined the procedure for determining whether a defendant is voluntarily absent in Wanosik.

In such circumstances, the State must make a preliminary showing, based on reasonable inquiry, that defendant’s absence is voluntary. Except as otherwise required by the attorney-client privilege, defense counsel has an obligation to aid the State by being forthcoming with any information defense counsel may have that could be helpful in determining the defendant’s whereabouts or reasons for the defendant’s absence. *When neither court nor counsel have information as to why the defendant is not present, a continuance will ordinarily be required to allow the prosecution and defense counsel an opportunity to inquire into the defendant’s whereabouts and the reason for his absence.*

Id., ¶22 (emphasis added). This Court concluded in Wanosik that Judge Frederick erred in sentencing Wanosik in absentia where the judge made an “‘inadequate inquiry into [Wanosik’s] ability to appear on [May 26, 2000] or his subsequent availability before deciding that he had waived his right to be present at [sentencing].’” Id., ¶25 (quoting Houtz, 714 P.2d at 678).

The trial judge approached the voluntariness inquiry in Wanosik in the same way he approached that inquiry in this case. Wanosik, 2001 UT App 241, ¶20. In Wanosik, “the trial court’s oral findings and analysis on the voluntariness of Wanosik’s absence at sentencing is the following: ‘I can only assume because he has not been in touch with [defense counsel] nor has he been in touch with my court that he has chosen to

voluntarily absent himself from these proceedings.” Id., ¶20. In the present case, the oral findings and analysis on the voluntariness issue was identical to that in Wanosik; the same trial judge stated, “I think we can only assume that him having had both written and oral notice on more than one occasion and failed to follow through that he is not here by choice.” R. 67[2]:2. Pursuant to Wanosik, the improper assumption made by the trial judge regarding the voluntariness of Mr. Gardner’s absence was error.

In Wanosik, the error in presuming the voluntariness of Wanosik’s absence did not require reversal because this Court concluded that Wanosik was not “prejudiced by the lack of adequate inquiry.” Id., ¶26. The error in presuming that Wanosik was voluntarily absent was harmless because “[w]hen finally apprehended, Wanosik sent a letter to the trial court candidly acknowledging: ‘I do not have a legitimate excuse’ for not appearing for sentencing.” Id. This Court concluded that because Wanosik subsequently conceded that he had voluntarily absented himself sentencing, he was not prejudiced by the trial judge’s error in failing to make an adequate voluntariness inquiry. Id.

By contrast, in the present case, Mr. Gardner was prejudiced by the trial judge’s failure to make an adequate inquiry into the voluntariness question. Unlike Wanosik, Mr. Gardner did not send a letter to the trial judge regarding his absence from sentencing. The only information in the record which pertains to Mr. Gardner’s absence is stand-in defense counsel’s statement, “[m]aybe it’s possible that Mr. Gardner had

contacted counsel but I'm thinking it's (inaudible)." R. 67[2]:2. In this case where the trial judge improperly presumed that Mr. Gardner's absence was voluntary and sentenced Mr. Gardner consecutively to the maximum statutory term on each count, the error in making an inadequate inquiry into the voluntariness issue requires that Mr. Gardner's sentence be vacated and the case remanded for a new sentencing.

2. Mr. Gardner Did Not Knowingly Waive His Right to Presence.

In Wanosik, this Court rejected Appellant's claim that he did not knowingly waive his right to presence because he had not been informed that he would be sentenced in absentia if he were not present at sentencing. Id., ¶¶11-16. This argument is based on the idea that the right to be present at sentencing cannot be lightly forfeited, and a defendant who is not given a specific warning of the consequences has not knowingly and intentionally relinquished the right to appear. See id.; see also United States v. McPherson, 421 F.2d 1127, 1129 (D.C. Cir. 1969); United States v. Turner, 532 F. Supp. 913, 915 (N.D. 1982); State v. Fettis, 664 P.2d 208, 209 (Ariz. 1983). Like Wanosik, Mr. Gardner maintains that he did not knowingly waive his right to presence at sentencing because he was not given a warning of the specific consequences of his failure to appear. While this Court has rejected this argument, Mr. Gardner raises it herein for purposes of preservation.

3. The Public Interest Did Not Require that Mr. Gardner Be Sentenced in Absentia.

This Court also rejected Wanosik's claim that his sentence must be vacated because the public interest in sentencing him in absentia did not outweigh Wanosik's interest in being present. *Id.*, ¶¶17-18. This argument is based *inter alia* on Anderson, 929 P.2d at 1111 (court looks to practical considerations which supported proceeding in absentia); United State v. Fontanez, 878 F.2d 33, 36 (2d Cir. 1989) (court considers whether public interest in proceeding with sentencing in absentia outweighs defendant's interest in being present in deciding whether to uphold sentencing in absentia); and Smith v. Mann, 173 F.2d 73, 76 (2d Cir. 1999).

In this case, the trial judge erred in not balancing the public interest in proceeding in absentia against Mr. Gardner's interest in being present, and the record does not demonstrate that the public interest required that the judge proceed with sentencing in absentia. The sentencing judge was not the judge at the plea hearing and there was no risk that information relevant to sentencing would be lost. Mr. Gardner had lived in the area for thirty six years and at the same address for eighteen months. R. 13. The fact that Mr. Gardner was arrested eight days after sentencing (R. 49) underscores the ease of locating Mr. Gardner and demonstrates that the public interest in proceeding in absentia did not outweigh Mr. Gardner's right to presence.

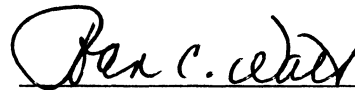
Although this Court indicated in Wanosik that a balancing of interests is not required in determining whether a defendant knowingly and voluntarily waived his right to presence (Wanosik, 2001 UT App 241, ¶18), Mr. Gardner nevertheless maintains that

due process requires such a balancing of interests, and raises that claim for purposes of preservation.

CONCLUSION

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

SUBMITTED this 6th day of September, 2001.

A handwritten signature in cursive script, appearing to read "Joan C. Watt", written over a horizontal line.

JOAN C. WATT

Attorney for Defendant/Appellant

C. BEVAN CORRY

Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, JOAN C. WATT, hereby certify that I have caused to be hand-delivered the original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 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 84114-08540, this 6th day of September, 2001.



JOAN C. WATT

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this _____ day of September, 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: 011901634 FS
 :
ROBERT LEON GARDNER, : Judge: J. DENNIS FREDERICK
Defendant. : Date: March 30, 2001
Custody: Salt Lake County Jail

S.O. # 121160

PRESENT

Clerk: cindyb
Prosecutor: UPDEGROVE, KENNETH R
Defendant not present
Defendant's Attorney(s): SIMMS, CLAYTON A.

DEFENDANT INFORMATION

Date of birth: January 21, 1964
Video
Tape Number: 1 Tape Count: 9:19-9:22

CHARGES

1. ATTEMPTED RETAIL THEFT (SHOPLIFTING) (amended) - Class A
Misdemeanor
Plea: Guilty - Disposition: 02/13/2001 {Guilty Plea}
2. ATTEMPTED ESCAPE FROM OFFICIAL CUSTODY (amended) - Class A
Misdemeanor
Plea: Guilty - Disposition: 02/13/2001 {Guilty Plea}

SENTENCE JAIL

Based on the defendant's conviction of ATTEMPTED RETAIL THEFT (SHOPLIFTING) a Class A Misdemeanor, the defendant is sentenced to a term of 1 year(s)
Based on the defendant's conviction of ATTEMPTED ESCAPE FROM OFFICIAL CUSTODY a Class A Misdemeanor, the defendant is sentenced to a term of 1 year(s)

Commitment is to begin immediately.

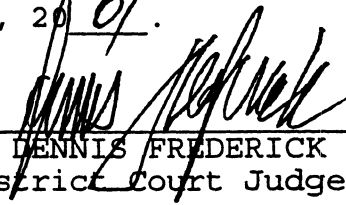
Case No: 011901634
Date: Mar 30, 2001

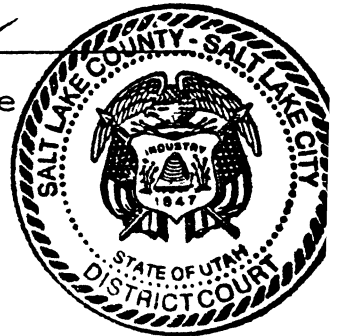
SENTENCE JAIL CONCURRENT/CONSECUTIVE NOTE

Terms to run consecutive.

The Court finds defendant voluntarily absented himself from the sentencing proceedings and sentences the defendant in absentia. The Court previously ordered a no-bail bench warrant issue for defendant. Defendant to be committed forthwith upon his arrest. Counsel for the State to prepare findings and order re absentia.

Dated this 30th day of Mar., 2001.


J. DENNIS FREDERICK
District Court Judge



ADDENDUM B

APPEARANCES

For the Plaintiff:

KENNETH R. UPDEGROVE
ASSISTANT DISTRICT ATTORNEY
231 East 400 South
Salt Lake City, Utah 84111

For the Defendant:

CLAYTON A. SIMMS
SALT LAKE LEGAL DEFENDERS
424 East 500 South #300
Salt Lake City, Utah 84111

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SALT LAKE CITY, UTAH - MARCH 30, 2001

HONORABLE J. DENNIS FREDERICK PRESIDING

P R O C E E D I N G S

THE COURT: State of Utah versus Robert Leon Gardner, Case Number CR01634. Is Mr. Robert Gardner in the courtroom or anyone in his behalf? That's what I assumed. He didn't appear at AP&P. A warrant has been issued for his arrest. No bail determined forthwith and I suspect when he is back with us, Mr. Corry will be the first to know.

MR. UPDEGROVE: Thank you, your Honor.

THE COURT: So, we'll, actually, counsel, let's return to that for the moment. I believe what I will do today is proceed with the sentencing in absentia, over your objection, of course. Mr. Gardner previously appeared and entered pleas of guilty to two separate Class A Misdemeanor crimes of attempted retail theft and attempted escape from official custody. A presentence report had been ordered based upon that plea and he was ordered to appear before this Court today for sentencing and to go directly to AP&P for the preparation of the report. He failed to do so. I will, therefore, conclude that his failures to appear and failures to contact counsel and this Court are indicative of an intentional absenting himself from these proceedings and will find that he has accomplished that.

I will order that he be committed to the Adult

1 Detention Center for one year on each of the two separate Class
2 A Misdemeanor charges and that those terms of one year each are
3 to be served consecutively and not concurrently. The warrant
4 that I have heretofore issued for his arrest will remain in
5 affect and upon his arrest, I'm sure he'll be in touch,
6 counsel.

7 MR. SIMMS: Your Honor, just to clarify the record.
8 Clayton Simms on behalf of Mr. Bevan Corry for Mr. Gardner.
9 Maybe it's possible that Mr. Gardner had contacted counsel but
10 I'm thinking it's (inaudible).

11 THE COURT: Right.

12 MR. SIMMS: And no contact -

13 THE COURT: I understand you were caught a little bit
14 short here but anything is possible. I think we can only
15 assume that him having had both written and oral notice on more
16 than one occasion and failed to follow through that he is not
17 here by choice. If something knew turns up then I'll be glad
18 to consider it.

19 MR. SIMMS: Thank you, Judge.

20 THE COURT: All right, Mr. Simms, thank you. Mr.
21 Updegrove, you're the lucky one to prepare the Findings of
22 Fact, Conclusions of Law and Order in the matter.

23 MR. UPDEGROVE: I have done several for your Honor.

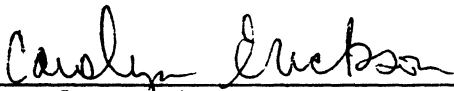
24 THE COURT: Yes, thank you.

25 (Whereupon the proceedings were concluded)

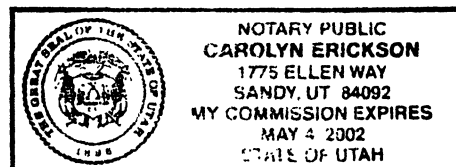
CERTIFICATE

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 19th day of June, 2001 in Sandy, Utah.


Carolyn Erickson
Certified Shorthand Reporter
Certified Court Transcriber

My Commission expires May 4, 2002



ADDENDUM C

UTAH RULES OF CRIMINAL PROCEDURE

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.

ADDENDUM D

DAVID E. YOCOM
District Attorney for Salt Lake County
KENNETH R. UPDEGROVE, 4931
Deputy District Attorney
231 East 400 South, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 363-7900

FILED DISTRICT COURT
Third Judicial District

APR - 5 2001

By C. Bailey SALT LAKE COUNTY
Deputy Clerk

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

THE STATE OF UTAH,	
Plaintiff,	FINDINGS OF FACT AND CONCLUSION OF LAW
-vs-	
ROBERT LEON GARDNER,	Case No. 011901634FS Hon. J. Dennis Frederick
Defendant.	

Defendant was scheduled to be sentenced by this Court on March 30, 2001, at 8:30 a.m. Clayton A. Simms, Salt Lake Legal Defender Association, was present representing the Defendant and stood in for Charles B. Corry, counsel of record. The State of Utah was represented by Kenneth R. Updegrove, Deputy Salt Lake County District Attorney. Defendant was not present.

Based on the Court's record in the above-entitled matter, the Court makes the following Findings of Fact and Conclusion of Law.

FINDINGS OF FACT

1. That Defendant entered a plea of guilty to Attempted Retail Theft and Attempted Escape, both Class A Misdemeanors, on February 13, 2001, before the Honorable Randall N. Skanchy.
2. That Sentencing was scheduled for March 30, 2001, at 8:30 a.m., before this Court and Defendant was informed of the Sentencing date and time after he entered his pleas of guilty.

FINDINGS OF FACT AND CONCLUSION OF LAW

Case No. 011901634FS

Page 2

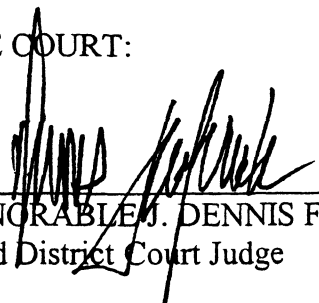
3. That when Defendant entered his plea of guilty on February 13, 2001, he was represented by counsel Charles B. Corry.
4. That Defendant was not present before this Court on March 30, 2001, at 8:30 a.m., nor did he appear at any time during the Morning Criminal Calendar.
5. That counsel Charles B. Corry was not present but counsel Clayton A. Simms, representing Defendant at Sentencing, had no explanation why Defendant was not present in Court.
6. That Defendant voluntarily, willfully, and without valid excuse, absented himself from the presence of this Court on March 30, 2001, during the Morning Criminal Calendar.

CONCLUSION OF LAW

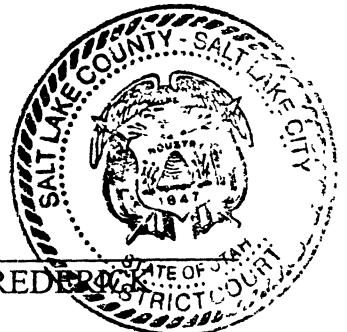
Based upon the foregoing Findings of Fact and Rules 17(a)(2) and 22(b), U.R. Crim. P., the Court concludes, as a matter of law, that Defendant may be sentenced on March 30, 2001, at 8:30 a.m., without being present before the Court.

DATED this 31st day of April, 2001

BY THE COURT:



HONORABLE J. DENNIS FREDERICK
Third District Court Judge



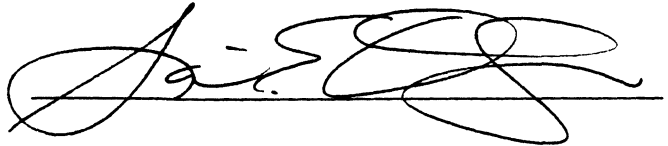
FINDINGS OF FACT AND CONCLUSION OF LAW

Case No. 011901634FS

Page 3

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing Findings of Fact and Conclusion of Law was delivered to Charles B. Corry, Counsel for Defendant, Robert Leon Gardner, by placing it in the Salt Lake Legal Defender Association box located in the Office of the District Attorney for Salt Lake County on this 3 day of April, 2001.

A handwritten signature in black ink, appearing to be "A. S. S.", is written over a horizontal line.