

2015

**State of Utah, Plaintiff/Appellee, vs. Spencer Richardson,  
Defendant/Appellant**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,  
Plaintiff/Appellee,

v.

SPENCER RICHARDSON,  
Defendant/Appellant.

Case Number: 20150454-CA

**BRIEF OF THE APPELLANT**

Appeal from a conviction for possession of a controlled substance and retail theft, third degree felonies in the Third District Court, State of Utah, the Honorable Paul B. Parker, Judge, presiding.

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*Attorney for Appellant*

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UTAH APPELLATE COURTS

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STATE OF UTAH,  
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**NATURE OF THE PROCEEDINGS AND JURISDICTION**

Appeal from a conviction for possession of a controlled substance and retail theft, third degree felonies in the Third District Court, State of Utah, the Honorable, Paul B. Parker, Judge, presiding.

This court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(e).

**STATEMENT OF THE ISSUES & STANDARD OF REVIEW**

1. Whether defense counsel ineffectively failed to alert the court to the State's breach of the plea agreement.
  - a. Standard of Review: Whether defense counsel was ineffective is a question of law. *State v. Ott*, 2010 UT 1, ¶ 16, 247 P.3d 344.
  - a. Preservation of the Argument: The issue was not preserved and must be reviewed for ineffective assistance of counsel.

## **CONSTITUTIONAL OR STATUTORY PROVISIONS**

The texts of the relevant Constitutional provisions and statutes are in Addendum A and B.

## **STATEMENT OF THE CASE**

On May 19, 2014, Mr. Richardson was sentenced on his first case to a probationary term. R. 254-59. On May 4, 2015, Mr. Richardson was sentenced to a term of incarceration on a new charge as well as a probation violation on the first case. R. 272-80. The judgments entered on May 4, 2015. R. 192; R\*. 97-99.<sup>1</sup> On June 4, 2015, Mr. Richardson filed a notice of appeal on both cases to this court. R. 217-18; R\*. 115-16.

## **STATEMENT OF THE FACTS**

On April 7, 2014, Mr. Richardson entered a guilty plea to one felony count and the State dismissed the other counts and agreed to his release pending sentencing and that they would not recommend additional jail time. R. 248-53. On May 19, 2014, the court sentenced Mr. Richardson to a suspended prison term, with probationary conditions. R. 254-59.

On December 22, 2014, Mr. Richardson entered a guilty plea to a new offense of retail theft, which was a violation of his probation on the first case. R. 260-66. As part of the plea agreement, the State agreed “to recommend Mr.

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<sup>1</sup> Mr. Richardson has cited to the record pages for case 13190770 throughout this brief. When he has had to cite the record for case 141913501, he will use the R\* symbol to distinguish them.

Richardson's release at the time of his plea" and at sentencing "not to recommend prison and affirmatively recommend probation, so long as Mr. Richardson is not charged with any new crimes between the time of his release and the time of his sentencing." R\*. 25. The State also agreed "to recommend that Mr. Richardson's probation be revoked and reinstated" in the first case. *Id.*

However, at sentencing on May 4, 2015, the matter was before a new prosecutor, a new judge, and a new defense attorney. R. 261, 268. Defense counsel made no mention of the State's recommendations and the prosecutor only made one short statement: "We'll submit it." R. 270. The court sentenced Mr. Richardson to a year in jail time on both cases. R. 272-80.

### **SUMMARY OF THE ARGUMENT**

At no point did the State fulfill its agreement, which was to "affirmatively recommend probation" and that he be "revoked and reinstated" on his probationary case. This amounted to a breach of the plea agreement, which entitles this case to be remanded for either specific enforcement of the agreement or for Mr. Richardson to withdraw his plea.

### **ARGUMENT**

#### **POINT I**

#### **DEFENSE COUNSEL INEFFECTIVELY FAILED TO ARGUE THAT THE PROSECUTOR BREACHED THE PLEA AGREEMENT**

The State breached its plea agreement by not making the recommendations it agreed to make at sentencing. This was all the more important, given the fact



that sentencing occurred before a new judge, a new prosecutor and a new defense attorney.

“Because a defendant pleading guilty pursuant to a plea agreement waives a number of fundamental rights, *see Boykin v. Alabama*, 395 U.S. 238, 243 (1969), the circumstances surrounding the plea agreement must comport with due process to ensure a defendant’s understanding.” *Spence v. Superintendent*, 219 F.3d 162, 167 (2nd Cir. 2000). As this Court has ruled, “both constitutional and supervisory concerns require holding the government to a greater deal of responsibility than the defendant” in interpreting plea agreements. *State v. Patience*, 944 P.2d 381, 387 (Utah Ct. App. 1997) (quoting *United States v. Ringling*, 988 F.2d 504, 506 (4th Cir. 1993)). “Thus, the state bears the primary responsibility for insuring precision and unambiguity in a plea agreement because of the significant constitutional rights the defendant waives by entering a guilty plea.” *State v. Kaufman*, 404 S.E.2d 763, 768 (W.V. 1991).

“Due process applies to sentencing procedures.” *State v. Howell*, 707 P.2d 115, 117 (Utah 1985). Therefore, the State has an obligation to fulfill its plea bargain. “It is well established that a prosecutor may not make promises which induce a guilty plea and then refuse to keep those promises.” *State v. Copeland*, 765 P.2d 1266, 1275 (Utah 1988); *State v. Johnson*, 2012 UT 68, ¶ 18 n. 7, 290 P.3d 21.

In *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), at the time the plea bargain was entered into, the prosecutor agreed not to make a recommendation at sentencing. *Id.* at 258. However, at sentencing, a new

prosecutor argued for the maximum sentence. *Id.* The Supreme Court reversed the conviction, noting that ““when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.” *Id.* at 262.

The Utah Supreme Court similarly found that a defendant was entitled to an evidentiary hearing to ascertain whether the prosecutor did, in fact, make the agreement he promised to make. If not, the Court said, “defendant is entitled to have his sentence set aside and to be resentenced with the benefit of his bargain, viz., a personal recommendation to the court, for probation, by the prosecutor.” *State v. Garfield*, 552 P.2d 129, 130 (Utah 1976). In this situations like this the State needs to be “compel[led] ... to honor the terms of its agreement with [the Defendant].” *State v. Quintana*, 2002 UT App 166, ¶ 13, 48 P.3d 249.

“[W]hen a plea agreement is breached by the prosecutor, the proper remedy is either specific performance of the plea agreement or withdrawal of the guilty plea both at the discretion of the trial judge.” *State v. Smit*, 2004 UT App 222, ¶ 17, 95 P.3d 1203; *see also Copeland*, 765 P.2d at 1276 (Utah 1988) (“defendant must be allowed to withdraw his plea if the State made a promise it did not or could not fulfill”); *State v. West*, 765 P.2d 891, 896 (Utah 1988) (“the remedy for a defendant where the State fails to fulfill its side of the bargain is frequently specific performance”); *State v. Dunn*, 2009 UT App 308, \*1 (unpublished); *State v. Lindsey*, 2014 UT App 288, ¶ 16, 340 P.3d 176 (citing *Smit*, 2004 UT App 222, ¶ 17) (“If the prosecutor breaches the agreement, then the

court must afford the defendant a remedy, either by permitting the withdrawal of the plea or requiring the State to perform”).

Trial counsel ineffectively failed to alert the court to this issue. The Sixth Amendment to the United States Constitution provides that defendants are entitled to effective representation at trial. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). To establish a claim of ineffective assistance, a defendant must show that (1) his attorney's acts or omissions “fell below an objective standard of reasonableness,” and (2) “ ‘there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.’” *Powell*, 2007 UT 9, ¶ 45 (footnotes omitted); *see also State v. Holland*, 876 P.2d 357, 359 (Utah 1994) (“defendants are wholly dependent on the dedication of their attorneys to protect their interests and to ensure their fair treatment under the law”).

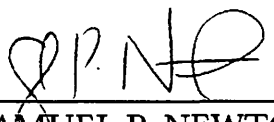
Counsel would have no reason to neglect to alert the court to the State's failure to make a recommendation that Mr. Richardson stay on probation. Counsel argued at sentencing that Mr. Richardson should be given probation and would have every reason to ensure that the State made the same recommendation. R. 270. The failure cannot be attributed to any reasonable strategy because it allowed the court to sentence Mr. Richardson without the State's position, which was in line with Mr. Richardson's. There was no conceivable benefit for counsel's failure to remind the court of the State's recommendation. But for counsel's error, there is a high likelihood that the court would have given Mr. Richardson a

probationary, non-jail sentence, since both parties would have made the same recommendation.

### **CONCLUSION**

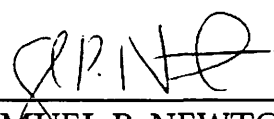
For these reasons, this court should find that defense counsel ineffectively failed to alert the trial court to the State's breach of its plea agreement and should remand the matter for either resentencing or specific performance of the agreement.

RESPECTFULLY SUBMITTED this 16 day of December, 2015.

  
\_\_\_\_\_  
SAMUEL P. NEWTON  
Attorney for the Defendant/Appellant

### **RULE 24 CERTIFICATE OF COMPLIANCE**

Pursuant to rule 24(f)(1)(C), Utah Rules of Appellate Procedure, I certify that this brief has been prepared in a proportionally-spaced font using Microsoft Word for Mac 2011 in Baskerville 13 point, and contains 1476 words, excluding the table of contents, table of authorities, and addenda.

  
\_\_\_\_\_  
SAMUEL P. NEWTON  
Attorney for the Defendant/Appellant

### **CERTIFICATE OF SERVICE**

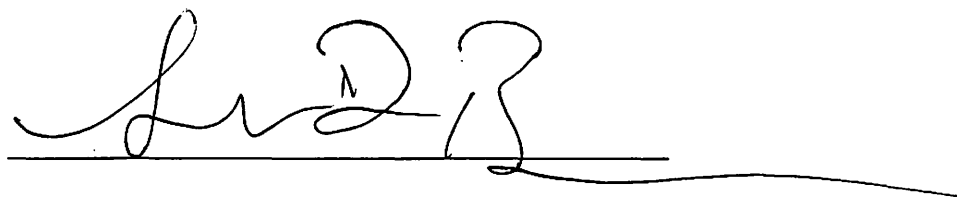
I hereby certify that on 18<sup>th</sup> December, 2015, I have caused to be ☐  
mailed ☒ hand-delivered eight copies of the foregoing to:

Utah Court of Appeals  
450 South State  
P.O. Box 140230  
Salt Lake City UT 84114-0230

I certify that on 18<sup>th</sup> December, 2015, two copies of the foregoing brief  
were ☐ mailed ☒ hand-delivered to:

Utah Attorney General  
160 East 300 South, 6th Floor  
PO BOX 140854  
Salt Lake City, Utah 84114-0854

A digital copy of the brief was also included: ☒ Yes ☐ No

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

Tab A

## **ADDENDUM A**

### **Constitutional Provisions**

#### **UNITED STATES CONSTITUTION**

##### **FIFTH AMENDMENT**

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

##### **SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

##### **FOURTEENTH AMENDMENT, SECTION 1**

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

## **UTAH CONSTITUTION**

### **ARTICLE I, SECTION 7. [DUE PROCESS OF LAW.]**

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

### **ARTICLE I, SECTION 12. [RIGHTS OF ACCUSED PERSONS.]**

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases.



Tab B

**ADDENDUM B**  
**Plea Agreement Form**

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

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STATE OF UTAH,	:	STATEMENT OF DEFENDANT
Plaintiff,	:	IN SUPPORT OF GUILTY PLEA
	:	AND CERTIFICATE OF COUNSEL
vs.	:	Case No. 141913501
SPENCER RICHARDSON,	:	
Defendant.	:	

---

I, Spencer Richardson, hereby acknowledge and certify that I have been advised of and that I understand the following facts and rights:

**Notification of Charges**

I am pleading guilty (or no contest) to the following crimes:

	<b>Crime &amp; Statutory Provision</b>	<b>Degree</b>	<b>Punishment Min/Max and/or Minimum Mandatory</b>
A.	<u>Retail Theft w/ Priors</u>	<u>3</u>	<u>0-5 USP. \$0-5000 + 90%</u>

I have received a copy of the Information against me. I have read it, or had it read to me, and I understand the nature and the elements of crime to which I am pleading guilty.

The elements of the crime(s) to which I am pleading guilty (or no contest) are:  
That on or about November 24, 2014 in Salt Lake County, Spencer Richardson, a party to the offense, did knowingly take possession of, conceal, carry away, transfer or cause to be carried away any merchandise displayed, held, stored or offered for sale in a retail mercantile establishment with the intention of retaining such merchandise or with the intention of depriving the merchant permanently of the possession, use or benefit of such merchandise without paying the retail value of such merchandise and had a qualifying offense w/in ten years.

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I understand that by pleading guilty I will be admitting that I committed the crimes listed above. I stipulate and agree that the following facts describe my conduct and the conduct of other persons for which I am criminally liable. These facts provide a basis for the court to accept my guilty pleas and prove the elements of the crime(s) to which I am pleading guilty (or no contest):

On November 24, 2014, in Salt Lake County, Mr. Richardson knowingly carried away merchandise from the Sports Authority and intended to retain that merchandise without paying for those items and had a prior qualifying conviction in case 121907811.

### **Waiver of Constitutional Rights**

I am entering these pleas voluntarily. I understand that I have the following rights under the constitutions of Utah and of the United States. I also understand that if I plead guilty I will give up all the following rights:

**Counsel:** I know that I have the right to be represented by an attorney and that if I cannot afford one, an attorney will be appointed by the court at no cost to me. I understand that I might later, if the judge determined that I was able, be required to pay for the appointed lawyer's service to me.

I have not waived my right to counsel.

If I have **not** waived my right to counsel, my attorney is M. E. Larson. My attorney and I have fully discussed this statement, my rights, and the consequences of my guilty plea(s).

**Jury Trial.** I know that I have a right to a speedy and public trial by an impartial (unbiased) jury and that I will be giving up that right by pleading guilty.

**Confrontation and cross-examination of witnesses.** I know that if I were to have a trial, a) I would have the right to see and observe the witnesses who testified against me and b) my attorney, or myself if I waived my right to an attorney, would have the opportunity to cross-examine all of the witnesses who testified against me.

**Right to compel witnesses.** I know that if I were to have a trial, I could call witnesses if I chose to, and I would be able to obtain subpoenas requiring the attendance and testimony of those witnesses. If I could not afford to pay for the witnesses to appear, the State would pay those costs.

**Right to testify and privilege against self-incrimination.** I know that if I were to have a trial, I would have the right to testify on my own behalf. I also know that if I chose not to testify, no one could make me testify or make me give evidence against myself. I also know that if I chose not to testify, the jury would be told that they could not hold my refusal to testify against me.

**Presumption of innocence and burden of proof.** I know that if I do not plead guilty, I am presumed innocent until the State proves that I am guilty of the charged crime(s). If I choose to fight the charges against me, I need only plead "not guilty," and my case will be set for a trial. At a trial, the State would have the burden of proving each element of the charge(s) beyond a reasonable doubt. If the trial is before a jury, the verdict must be unanimous, meaning that each juror would have to find me guilty.

I understand that if I plead guilty, I give up the presumption of innocence and will be admitting that I committed the crime(s) stated above.

**Appeal.** I know that under the Utah Constitution, if I were convicted by a jury or judge, I would have the right to appeal my conviction and sentence. If I could not afford the costs of an appeal, the State would pay those costs for me. I understand that I am giving up my right to appeal my conviction if I plead guilty. I understand that if I wish to appeal my sentence I must file a notice of appeal within 30 days after my sentence is entered.

**I know and understand that by pleading guilty, I am waiving and giving up all the statutory and constitutional rights as explained above.**

#### **Consequences of Entering a Guilty (or No Contest) Plea**

**Potential penalties.** I know the maximum sentence that may be imposed for each crime to which I am pleading guilty. I know that by pleading guilty to a crime that carries a mandatory penalty, I will be subjecting myself to serving a mandatory penalty for that crime. I know my sentence may include a prison term, fine, or both.

I know that in addition to a fine, a ninety percent (90%) surcharge will be imposed. I also know that I may be ordered to make restitution to any victim(s) of my crimes, including any restitution that may be owed on charges that are dismissed as part of a plea agreement.

**Consecutive/concurrent prison terms.** I know that if there is more than one crime involved, the sentences may be imposed one after another (consecutively), or they may run at the same time (concurrently). I know that I may be charged an additional fine for each crime that I plead to. I also know that if I am on probation or parole, or awaiting sentencing on another offense of which I have been convicted or which I have plead guilty), my guilty plea(s) now may result in consecutive sentences being imposed on me. If the offense to which I am now pleading guilty occurred when I was imprisoned or on parole, I know the law requires the court to impose consecutive sentences unless the court finds and states on the record that consecutive sentences would be inappropriate.

**Plea agreement.** My guilty plea is the result of a plea agreement between myself and the prosecuting attorney. All the promises, duties, and provisions of the plea agreement, if any, are fully contained in this statement, including those explained below:

Count 2 (false personal information to a peace officer is dismissed). The state agrees to recommend Mr. Richardson's release at the time of his plea. The parties agree that Mr. Richardson shall get a presentence report from AP&P. At sentencing, the state agrees not to recommend prison and affirmatively recommend probation, so long as Mr. Richardson is not charged with any new crimes between the time of his release and the time of his sentencing. The state also agrees to recommend that Mr. Richardson's probation be revoked and reinstated in case 131910770.

**Trial judge not bound.** I know that any charge or sentencing concession or recommendation of probation or suspended sentence, including a reduction of the charges for sentencing, made or sought by either defense counsel or the prosecuting attorney are not binding on the judge. I also know that any opinions they express to me as to what they believe the judge may do are not binding on the judge.

**Immigration/Deportation:** I understand that if I am not a United States citizen, my plea(s) today may, or even will, subject me to deportation under United States immigration laws and regulations, or otherwise adversely affect my immigration status, which may include permanently barring my re-entry into the United States. I understand that if I have questions about the effect of my plea on my immigration status, I should consult with an immigration attorney.

#### **Defendant's Certification of Voluntariness**

I am entering this plea of my own free will and choice. No force, threats, of unlawful influence of any kind have been made to get me to plead guilty. No promises except those contained in this statement have been made to me.

I have read this statement, or I have had it read to me by my attorney, and I understand its contents and adopt each statement in it as my own. I know that I am free to change or delete anything contained in this statement, but I do not wish to make any changes because all of the statements are correct.

I am satisfied with the advice and assistance of my attorney.

I am \_\_\_\_ years of age. I have attended school through the \_\_\_\_\_ grade. I can read and understand the English language. If I do not understand English, an interpreter has been provided to me. I was not under the influence of any drugs, medication, or intoxicants which would impair my judgment when I decided to plead guilty. I am not presently under the influence of any drug, medication, or intoxicants which impair my judgment.

I believe myself to be of sound and discerning mind and to be mentally capable of understanding these proceedings and the consequences of my plea. I am free of any mental disease, defect, or impairment that would prevent me from understanding what I am doing or from knowingly, intelligently, and voluntarily entering my plea.

**I understand that if I want to withdraw my guilty plea(s), I must file a written motion to withdraw my plea(s) before sentence is announced. I understand that for a plea held in abeyance, a motion to withdraw from the plea agreement must be made within 30 days of pleading guilty. I will only be allowed to withdraw my plea if I show that it was not knowingly and voluntarily made. I understand that any challenge to my plea(s) made after sentencing must be pursued under the Post-Conviction Remedies Act in Title 78, Chapter 35a, and Rule 65C of the Utah Rules of Civil Procedure.**

Dated this 23 day of December, 2014

  
DEFENDANT

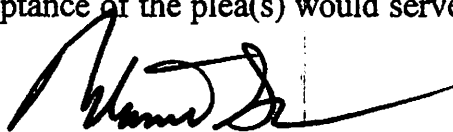
#### **Certificate of Defense Attorney**

I certify that I am the attorney for , the defendant above, and that I know he/she has read the statement or that I have read it to him/her; I have discussed it with him/her and believe that he/she fully understands the meaning of its contents and is mentally and physically competent. To the best of my knowledge and belief, after an appropriate investigation, the elements of the crime(s) and the factual synopsis of the defendant's criminal conduct are correctly stated; and these, along with the other representations and declarations made by the defendant in the foregoing affidavit, are accurate and true.

  
ATTORNEY FOR DEFENDANT  
Bar No. 12064

### **Certificate of Prosecuting Attorney**

I certify that I am the attorney for the State of Utah in the case against , defendant. I have reviewed this Statement of Defendant and find that the factual basis of the defendant's criminal conduct which constitutes the offense(s) is true and correct. No improper inducements, threats, or coercion to encourage a plea has been offered defendant. The plea negotiations are fully contained in the Statement and in the attached Plea Agreement or as supplemented on the record before the Court. There is reasonable cause to believe that the evidence would support the conviction of defendant for the offense(s) for which the plea(s) is/are entered and that the acceptance of the plea(s) would serve the public interest.



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PROSECUTING ATTORNEY

Bar No. 8273



## Order

Based on the facts set forth in the foregoing Statement and the certification of the defendant and counsel, and based on any oral representations in court, the Court witnesses the signatures and finds that defendant's guilty (or no contest) plea(s) is/are freely, knowingly, and voluntarily made.

IT IS HEREBY ORDERED that the defendant's guilty (or no contest) plea(s) to the crime(s) set forth in the Statement be accepted and entered.

Dated this 22 day of Dec, 2014

  
\_\_\_\_\_  
DISTRICT COURT JUDGE

Tab C

**ADDENDUM C**

**Sentencing and OSC Transcript**

**May 4, 2015**

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

STATE OF UTAH

Plaintiff,

VS.

SPENCER SCOTT RICHARDSON

Defendant.

CASE NO. 141913501

BEFORE THE HONORABLE PAUL B. PARKER

THIRD DISTRICT COURT  
450 SOUTH STATE STREET  
SALT LAKE CITY, UTAH 84114

HEARING  
ELECTRONICALLY RECORDED ON

MAY 4, 2015

Transcribed by: Colleen C. Southwick, RPR/CSR

A P P E A R A N C E S

FOR THE PLAINTIFF:

MICHAEL P. BOEHM  
Deputy Salt Lake County Attorney

FOR THE DEFENDANT:

RUDY J. BAUTISTA  
Attorney at Law

P R O C E E D I N G S

MR. BAUTISTA: Your Honor, can we address the Spencer Richardson matter, please. There are two of them.

THE COURT: This is 131910770 and 141913501.

MR. BAUTISTA: Your Honor, we're here for sentencing as well as an order to show cause.

THE COURT: Mr. Bautista for the defendant. And who is here for the State?

MR. BOEHM: I am here.

THE COURT: Mr. Boehm for the State. Are you Spencer Scott Richardson?

THE DEFENDANT: Yes, sir.

THE COURT: What's your birthdate?

THE DEFENDANT: 7/29/69.

THE COURT: All right. Go ahead, Mr. Bautista.

MR. BAUTISTA: As I indicated, your Honor, we're here for sentencing on case ending 3501 and an order to show cause in case ending 0770. We'd like to address the sentencing first.

THE COURT: Go ahead.

MR. BAUTISTA: Your Honor, there is a presentence report submitted. Speaking with Mr. Richardson there are some minor issues he'd had, however, they do not change the recommendation in the presentence report so discussing that we'd like to go forward with sentencing at this time.

1           This is a matter where Mr. Richardson has been  
2 suffering from mental health issues and has been making the  
3 most that he can to move his life forward. He's involved in  
4 going to school to make himself a better person. He has a  
5 final this Wednesday. In addition to that, he's been  
6 struggling to keep his life in order because his mother suffers  
7 from Parkinson's disease. He does live with his mother and he  
8 does take care of his mother. And he's not using it as an  
9 excuse, but part of his issues have been following through with  
10 his counseling to make sure he stays substance abuse free.

11           He has met with ARS and has kept completing the  
12 evaluation and is looking forward to complying with probation  
13 if he's given that privilege as well as following through with  
14 all the counseling recommendations and further schooling  
15 himself to make sure he moves forward from this occurrence and  
16 makes himself a better person.

17           THE COURT: The State.

18           MR. BOEHM: We'll submit it.

19           THE COURT: Mr. Richardson, you have the right to  
20 make a statement before I impose sentence. Is there anything  
21 you'd like to say?

22           THE DEFENDANT: Yes, your Honor. It's just been  
23 recently in probably the last six months that I've really  
24 realized the frailty of my mother, that she's in her twilight,  
25 you know, and helping her out. You know I was 13 days old when

1 I was adopted by her and now I've been able to give back to  
2 her. Our relationship wasn't really that good until recently,  
3 you know, for me to tie her shoes, to go on small walks and go  
4 to school and stuff. You know I did a lot of wrong things. I  
5 violated my probation and stuff. I'm sorry for that.

6 The last six months I've been doing good complying  
7 with probation. I've taken their classes and stuff. It's just  
8 a huge concern. I don't want to miss out on this last little  
9 bit with my mother. Like I said, I've been doing good with  
10 probation the last few months, you know, going to my classes,  
11 attending things. I know -- you know I've got a final this  
12 Wednesday. I was a very selfish person before and now I've  
13 realized my life impacts a lot of people and especially my dear  
14 mother. She wasn't able to make it today because of her  
15 physical condition.

16 I'm asking that you allow me to continue with  
17 probation, get a job. I'm working with my bishop. I've been  
18 referred to the Deseret Industries and stuff. I also took an  
19 employment class with the AP&P which was a real eye opener.  
20 Vocational rehab has accepted me. I showed the papers to my  
21 lawyer. Attending meetings. I'm just trying to do a 180. I  
22 know I've not got a pretty past, but I can only go forward from  
23 today.

24 THE COURT: Okay. Sir, I mean, I don't know  
25 exactly -- and I know you have some struggles -- how you can



1 say you've been successful in probation. It's been a mess.

2 THE DEFENDANT: I'm just talking about the last few  
3 months that I've been --

4 THE COURT: It's true I haven't had any recent  
5 allegations that you have been a problem.

6 THE DEFENDANT: Right.

7 THE COURT: But regardless of your mother's health,  
8 none of that is rationalization for this. I want you to know  
9 you're in the Matrix for prison. This is a ridiculous case to  
10 send anybody to prison on, but I will start to impose some jail  
11 time if I have to. You simply need to start complying with  
12 probation. You need to actually do what they tell you to do  
13 and stop using your drugs. You understand that?

14 THE DEFENDANT: Yes.

15 THE COURT: Having said that, I will follow the  
16 recommendation of the presentence report which really is place  
17 you back on probation. Frankly I'm not even sure why the  
18 probation violation just wants you in jail for a year, but  
19 given it's from the same agency I'll give you a chance on it.

20 On the third degree felony, retail theft, I'll impose  
21 zero to five years in the Utah State Prison, a fine of \$5000  
22 plus a 90 percent surcharge. I will suspend the imposition of  
23 all of the --

24 AP&P AGENT: Your Honor --

25 THE COURT: Yes.

1 AP&P AGENT: Agent (inaudible) with Adult Probation &  
2 Parole.

3 THE COURT: Are you his agent?

4 AP&P AGENT: I am, sir. Also the officer of the PSI  
5 as well as the order to show cause.

6 THE COURT: Thank you for explaining yourself, sir.

7 AP&P AGENT: With the sentencing (inaudible)  
8 contingent upon the sentencing of the order to show cause to  
9 the jail time.

10 THE COURT: So you want a year and then --

11 AP&P AGENT: Yes, sir. The new probation period  
12 would not begin until the conclusion of jail time at the close  
13 of the prior case.

14 THE COURT: Thank you very much. I appreciate that  
15 explanation because that's why I hesitated is because of how  
16 much jail time. I usually write that when I go down in front  
17 of it and I was frankly a little bit confused because of the  
18 recommendations that I saw to be inconsistent, but I will  
19 suspend, again, the prison time all but a year in the Salt Lake  
20 County Jail. Place you on probation to Adult Probation and  
21 Parole for 36 months on the following conditions:

22 First of all, that you follow the usual and ordinary  
23 conditions of probation, that is that you sign your probation  
24 agreement, that you not have any further offenses, you comply  
25 with all the laws. You allow yourself to be searched, your

1 person, your vehicle, your home. I will also authorize Adult  
2 Probation & Parole to really do whatever evaluation and  
3 assessment they need to do.

4 Clearly you need a mental health evaluation and  
5 further treatment. Whatever programming they direct you I want  
6 you to enter in to complete. You clearly need a substance  
7 abuse evaluation, enter into whatever programming that they are  
8 going to require you to do as well. Complete that. No drugs,  
9 no alcohol. Can't possess, use, consume any of those  
10 substances. Can't be around any people who are, be in bars or  
11 parties where it normally is.

12 You are to follow your doctor's care to take that  
13 medication which is prescribed for you. Take a theft class  
14 and complete cognitive therapy. You're also to pay restitution  
15 in the amount of \$428.88.

16 Any questions? Take him into custody --

17 MR. BAUTISTA: Your Honor?

18 THE COURT: -- for his year in jail.

19 MR. BAUTISTA: Your Honor, in regards to the year in  
20 jail, we're asking for several alternatives. No. 1, because he  
21 has a final on this Wednesday and he's been checking in with  
22 probation, if you do order that he be incarcerated, we ask he  
23 be allowed to surrender on Friday. He understands if he fails  
24 to surrender, then that would be a probation violation that  
25 would warrant a prison sentence imposed. In the alternative

1 we're asking if the Court would consider imposing the jail but  
2 staying its imposition for 95 days, put him on an electronic  
3 monitoring with AP&P and see how he progresses from that point  
4 in time on in consideration that he cares for his mother. That  
5 would allow him to finish his exams so that he can have  
6 completion with college education and allow him to have better  
7 opportunities for employment so that he can care for his  
8 mother.

9 He understands that with jail being imposed that it  
10 can be imposed at any moment if he violates the stay. And upon  
11 review if he hasn't been 110 percent in compliance and really  
12 convinced AP&P otherwise, then he'll go to jail at that point.

13 THE COURT: Let's deal with the order to show cause  
14 because that's related to it. He is charged on a probation  
15 violation report dated last year, is it not, 2014? I think it  
16 was signed December 10<sup>th</sup> 2014. The affidavit which supports  
17 it is dated the 9th of December 2014. Is that correct?

18 MR. BOEHM: Yes.

19 THE COURT: Sir, you have the right to have the State  
20 prove that you violated your probation. If you admit any of  
21 these, you will relieve them of that burden. Is it his intent  
22 to admit or deny the allegations?

23 MR. BAUTISTA: No, admit, your Honor.

24 THE COURT: Okay. Which ones will he be admitting?  
25 All of them?

1 MR. BAUTISTA: All of them, yes.

2 THE COURT: Okay. Sir, you're charged with using a  
3 controlled substance on August the 11<sup>th</sup> and the 25<sup>th</sup>, 2014;  
4 with having used a controlled substance on August 15<sup>th</sup>, 2014;  
5 having failed to complete the treatment as directed on  
6 August 27<sup>th</sup> of 2014; with having failed to report as directed  
7 on September the 4th, 2014, by having committed the offense of  
8 retail theft, I believe the one he was sentenced on on  
9 November 24<sup>th</sup>, 2014, and having committed the offense of  
10 false information to a peace officer on or about the 24<sup>th</sup> of  
11 November 2014.

12 Do you admit or deny these allegations?

13 MR. BAUTISTA: Your Honor, except for the false  
14 information he admits. The false information was --

15 THE COURT: All right. We'll strike that one. To  
16 allegations 1 through 5, admit or deny?

17 THE DEFENDANT: I admit them, your Honor.

18 THE COURT: All right. I am accepting those  
19 admissions. Find that you have violated your probation.

20 Does AP&P want to say anything further than what you  
21 said before? And you heard their request is to try and use the  
22 jail sentence as some kind of further stick. What do you  
23 think?

24 AP&P AGENT: Your Honor, I did talk to his attorney  
25 prior to this. We are willing to allow him to self report as

1 of Friday so he can complete that. I did confirm with the  
2 officer. He said he was taking one class at the college and he  
3 does have finals this week.

4 THE COURT: Okay. What about their idea of letting  
5 him out to take care of his mother?

6 AP&P AGENT: In all honesty, your Honor, he knew this  
7 was happening at the time this offense occurred and I'm not  
8 (inaudible).

9 (The transcriber cannot hear what the probation  
10 officer is saying. There is too much background  
11 noise.)

12 THE COURT: All right. I'll let him report on this  
13 Friday. When is the test?

14 THE DEFENDANT: It's Wednesday.

15 THE COURT: But you need to report by -- well, if the  
16 test is on Wednesday, let's have you report -- when is it on  
17 Wednesday?

18 THE DEFENDANT: I believe it is 9:10 we start.

19 THE COURT: When is the test done?

20 THE DEFENDANT: I believe they allow two hours for  
21 it. It would be nice to be able to kind of help set things up  
22 for my mother.

23 THE COURT: You're going to be back in on Wednesday  
24 at 5:00. The problem is this is that I read the probation  
25 violation reports and you've been a mess. You have a serious

1 drug problem, a serious mental health problem, and because of  
2 that you just keep committing offenses.

3 THE DEFENDANT: Right.

4 THE COURT: You need to be able to succeed. And  
5 they've tried to send you into treatment facilities, you leave  
6 or you violate. I have to give you some kind of a consequence,  
7 okay?

8 THE DEFENDANT: Is the 90 days on the ankle  
9 monitor --

10 THE COURT: The 90 days is not on the table. You  
11 report Wednesday.

12 THE DEFENDANT: Okay. I will do that.

13 THE COURT: Okay. So the sentence then on the  
14 probation violation is one year and closed then. He'll be on  
15 probation only on the felony matter and the jail time on the  
16 felony matter will run concurrent with the jail time here, so  
17 it will just be one year and then he'll be back out on  
18 probation.

19 MR. BAUTISTA: Yes, your Honor.

20 THE COURT: Okay. Good luck to you, sir.

21 MR. BAUTISTA: Was the whole case to be revoked and  
22 reinstated or?

23 THE COURT: Closed.

24 MR. BAUTISTA: Closed.

25 THE COURT: That's what I said, closed.

1 THE DEFENDANT: Is there any chance of a review  
2 during this year?

3 THE COURT: You talk to your attorney about that and  
4 we'll see later on.

5 (PROCEEDINGS IN THE ABOVE-ENTITLED  
6 MATTER WERE CONCLUDED.)

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## REPORTER'S CERTIFICATE

STATE OF UTAH           )  
                              :  SS.  
County of Utah         )

I, Colleen C. Southwick, Registered Professional  
Reporter for the State of Utah, do certify that the foregoing  
transcript was taken down by me stenographically from an  
electronic recording and thereafter transcribed;

That the same constitutes a true and correct  
transcription of the said proceedings;

That I am not of kin or otherwise associated with any  
of the parties herein or their counsel, and that I am not  
interested in the events thereof.

WITNESS my hand at Provo, Utah, this 3rd day of  
August, 2015.

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Colleen C. Southwick, RPR, CSR