

2002

Utah v. Zavala-Perez : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

:

Plaintiff/Appellee,

:

-v-

:

JOSE ZAVALA-PEREZ,

:

CASE NO. 20020079-CA

Defendant/Appellant.

:

BRIEF OF APPELLANT

An appeal from a bench trial conviction of Driving Under the Influence, a class B misdemeanor in violation of Utah Code Ann. § 41-6-44 (1998), Speeding, a class C misdemeanor in violation of Utah Code Ann. § 41-6-46 Utah Code Ann. (1998), and Faulty Equipment, a class C misdemeanor in violation of Utah Code Ann. § 41-6-117 or 155 (1998), the Honorable William W. Barrett, Judge, presiding.

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JUN 14 2002

CLERK OF THE COURT

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
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-v-	:	
JOSE ZAVALA-PEREZ,	:	CASE NO. 20020079-CA
	:	Priority No.
Defendant/Appellant.	:	

NATURE OF THE PROCEEDINGS AND JURISDICTION

This is an appeal from misdemeanor convictions in the Third Judicial District Court in and for Salt Lake County, Salt Lake Department, State of Utah, the Honorable William W. Barrett, Judge, presiding¹.

Jurisdiction is conferred on this Court pursuant to Utah Code Ann. § 78-2a-3(2)(e) (1999), which grants this Court jurisdiction in criminal cases not involving a conviction for a first degree or capital felony. Appellant/Defendant Jose Zavala-Perez was convicted of Driving Under the Influence, a class B misdemeanor in violation of Utah Code Ann. § 41-6-44 (1998), Speeding, a class C misdemeanor in violation of Utah Code Ann. § 41-6-46 Utah Code Ann. (1998), and Faulty Equipment, a class C misdemeanor in violation of Utah Code Ann. § 41-6-117 or 155 (1998).

¹See Sentence/Judgement/Commitment/Order R. 34 [attached hereto as Addendum "A"]. Judge L.A. Dever, who was covering Judge William Barrett's court at the time, denied Mr. Zavala-Perez' motion to strike bench trial and demanding jury trial, held the bench trial in absentia, and convicted Mr. Zavala-Perez. However, it was Judge Barrett who denied Mr. Zavala-Perez' motion to set aside the verdict and sentenced Mr. Zavala-Perez, thereby retaining jurisdiction over the case.

**STATEMENT OF THE FIRST ISSUE, STANDARD OF REVIEW, AND
PRESERVATION OF THE ARGUMENT**

Issue: Did the trial court err in proceeding with a bench trial in absentia without determining whether Mr. Zavala-Perez received notice or was voluntarily absent?

Standard of Review: Whether a defendant is properly tried in absentia is a question of law, which this Court reviews for correctness. See State v. Anderson, 929 P.2d 1107, 1108 (Utah 1996) (citing State v. Pena, 869 P.2d 932, 936 (Utah 1994)).

Preservation of the Argument: This issue is preserved on the record at R. 24–33.

**STATEMENT OF THE SECOND ISSUE, STANDARD OF REVIEW, AND
PRESERVATION OF THE ARGUMENT**

Issue: Did the trial court err in determining that, by not maintaining contact with his appointed counsel prior to trial, Mr. Zavala-Perez had waived his right to a jury trial?

Standard of Review: This Court reviews a trial court's legal determinations non-deferentially for correctness. See State v. Pena, 869 P.2d 932, 936 (Utah 1994).

Preservation of the Issue: This issue is preserved on the record at R. 17–20, 24–33, and 53[1].

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The following provisions of the Utah Constitution are relevant on appeal.

Utah Constitution, Article I, Section 10 provides:

In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous. In civil cases

three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded.

Utah Constitution, Article I, Section 12 provides, in pertinent part:

In criminal prosecutions the accused shall have the right to . . . have a speedy public trial by an impartial jury in the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases.

The following statutes are determinative of the issues on appeal.

Utah Code Annotated, Section 77-1-6 (1999)

Utah Rules of Criminal Procedure, Rule 17

Utah Rules of Criminal Procedure, Rule 22

The full text of these statutes are provided in Addendum "B."

STATEMENT OF THE CASE

Jose Zavala-Perez was charged by Information with Driving Under the Influence of Alcohol, Speeding, and Faulty Equipment. R. 2–4. Although a jury trial had originally been scheduled for September 12, 2001, the trial court determined that Mr. Zavala-Perez had waived his right to a jury trial by failing to maintain contact with his attorney, and re-scheduled this matter for a bench trial on October 29, 2001. R. 13–16, 18. The bench trial was further continued to November 26, 2001. R. 17, 25, 53.

On November 20, 2001, Mr. Zavala-Perez filed a Motion to Strike Bench Trial and Demand for Trial by Jury. R. 17–20. On November 26, 2001, the trial court denied that motion and held a bench trial in absentia. R. 53[1]. In his absence, the trial court

convicted Mr. Zavala-Perez on all counts. R. 53[35–36]. On December 28, 2001, Mr. Zavala-Perez filed a Motion to Set Aside Verdict and Grant a New Trial, which the trial court denied. R. 24–33.

On January 17, 2002, Mr. Zavala-Perez filed a timely notice of appeal. R. 37–38.

STATEMENT OF THE FACTS

On March 1, 2001, the State filed an Information charging Mr. Zavala-Perez with Driving Under the Influence of Alcohol, Speeding, and Faulty Equipment, alleged to have occurred on February 17, 2001. R. 2–4. At a pretrial conference on June 18, 2001, Mr. Zavala-Perez, who required the aid of a Spanish interpreter, was unable to reach a disposition and verbally demanded a jury trial. R. 18–19. Pursuant to that demand, the trial court ordered that a jury trial be set on September 12, 2001. R. 9–12. The record does not contain any indication that Mr. Zavala-Perez received any warnings or admonishments received regarding his rights at that time.

However, Mr. Zavala-Perez failed to contact his attorney prior to the trial date, and on September 12, the trial court continued the case and re-set it for a bench trial for October 29, 2001. R. 13–18, 37. The trial court informed Mr. Zavala-Perez that, by not maintaining contact with his attorney, he had waived his right to a jury trial. R. 18.

At some point prior to October 29, 2001, Mr. Zavala-Perez' bench trial was continued to November 26, 2001. R. 53. This continuance was granted by the court on stipulation of counsel and without an appearance in court by Mr. Zavala-Perez. R. 17,

25–26. Furthermore, the record is devoid of any evidence that notice, either actual or constructive, was provided to Mr. Zavala-Perez regarding the new date for a bench trial. See e.g., R. 7–16; 25–26; 53[1]. Defense counsel, via an interpreter for Salt Lake Legal Defender Association, attempted to contact Mr. Zavala-Perez by telephone to inform him of the new date. R. 26. According to Mr. Zavala-Perez, he did speak with someone who told him that his October 29 trial had been continued and that they would call back in the future when his new date was known. Id. Although defense counsel had a current address and phone number for Mr. Zavala-Perez, no written notice of the new date was ever sent. Id. In addition, in an attempt to contact his attorney prior to November 26, Mr. Zavala-Perez left a “stack of messages” with his attorney. R. 53[1]. None of these phone calls were returned prior to the date of trial. Id.

On November 20, 2001, Mr. Zavala-Perez filed a motion to strike the bench trial and demanding a jury trial. R. 18–20. On November 26, 2001, without oral argument and without defense counsel or the defendant being present in the court, the trial court denied the motion. R. 53[1]. Once defense counsel arrived in court, he found that the motion had been denied and that Mr. Zavala-Perez was not present. R. 53[1]. No effort was made at that time to contact Mr. Zavala-Perez, to ascertain his location, or why he had not appeared in court. R. 53[1]. The trial court then proceeded to hold a bench trial in absentia and found Mr. Zavala-Perez guilty on all counts based on the testimony of the State’s witnesses. R. 53[2–36]. Mr. Zavala-Perez and his wife were the only witnesses

the defense intended to call at trial. R. 28, 53[30–31]. As such, defense counsel was unable to present any evidence or defense. R. 53[30].

On December 28, 2001, Mr. Zavala-Perez filed a Motion to Set Aside Verdict and Grant a New Trial. R. 24–33. On January 14, 2002, the trial court denied Mr. Zavala-Perez’ motion and sentenced him in absentia to 180 days in jail, 178 of which were suspended, a fine of \$1300, forty hours of community service, DUI classes, and placed him on eighteen months of good behavior probation. R. 34. Mr. Zavala-Perez filed a timely notice of appeal. R. 37–38.

SUMMARY OF ARGUMENT

The trial court erroneously conducted a bench trial in Mr. Zavala-Perez’ absence. Trial in absentia infringes upon a defendant’s right to be present under the state and federal constitutions and the Utah Rules of Criminal Procedure. See State v. Anderson, 929 P.2d 1107, 1109–10 (Utah 1996); Taylor v. United States, 414 U.S. 17, 20 (1973); Utah R. Crim. P. 17(a). While the right to be present may be waived, any waiver must be both knowing and voluntary. See State v. Wanosik, 2001 UT App. 241, ¶10, 31 P.3d 615.

At an absolute minimum, knowing waiver requires that the defendant receive notice of the time, date, and place of the proceeding. See id. at ¶19 n.8. In the instant case, the record is silent as to whether Mr. Zavala-Perez received any notice of his bench trial on November 26, 2001. R. 7–16. Thus, his absence cannot be said to be knowing.

Further, even if a defendant has received notice of the proceedings, the trial court is required to conduct an inquiry into whether the defendant's absence is also voluntary. See id. ¶19. The trial court made no such inquiry as to Mr. Zavala-Perez' absence in this case. As such, the trial court erred in conducting a bench trial in absentia. Furthermore, as his absence prevented Mr. Zavala-Perez from presenting any evidence or mounting any defense, the trial court's error was prejudicial.

Additionally, prior to conducting the bench trial in absentia, the trial court had erroneously concluded that Mr. Zavala-Perez had waived his right to a jury trial by failing to maintain contact with his attorney before trial. Mr. Zavala-Perez has a right to a jury trial under Article I, Sections 10 and 12 of the Utah Constitution. Waiver of a constitutional right must be knowing, intelligent, and voluntary. See Colorado v. Spring, 479 U.S. 564, 579 (1987).

Furthermore, even if Mr. Zavala-Perez does not have a constitutional right to a jury trial, under Utah Code Ann. § 77-1-6 (1999) and Rule 17 of the Utah Rules of Criminal Procedure, criminal defendants are entitled to a trial by jury in all cases except infractions. See Salt Lake City v. Roseto, 2002 UT App. 66, ¶¶ 8–14, 44 P.3d 835. Waiver of a statutory right, although not as strict as a constitutional right, requires that “the record as a whole reflects the [defendant's] reasonable understanding of the proceedings and awareness of the right.” State v. Byington, 936 P.2d 1112, 1117 (Utah Ct. App. 1997).

Whatever the source of Mr. Zavala-Perez' right to a jury trial, he simply did not waive this right. Although he failed to maintain contact with his attorney, Mr. Zavala-Perez was present in court on the date and time of his scheduled jury trial. R. 25. The waiver of either his constitutional or statutory right to a jury trial requires something more than merely failing to maintain contact with his attorney prior to trial, especially where there is no indication from the record that Mr. Zavala-Perez was informed of such a consequence. Therefore, the trial court erred in determining that Mr. Zavala-Perez had waived his right to a jury trial. On remand, this case should be re-set for a jury trial.

ARGUMENT

I. THE IN ABSENTIA BENCH TRIAL VIOLATED MR. ZAVALA-PEREZ' RIGHT TO BE PRESENT AND UTAH RULE OF CRIMINAL PROCEDURE 17(a).

With no showing that Mr. Zavala-Perez received notice of the November 26 bench trial or that his failure to appear on that date was voluntary, the trial court erred in conducting the bench trial in absentia. Both the Utah and United States Constitutions guarantee the right of a defendant to be present. See Utah Const. art. I, § 12 (stating “accused shall have the right to appear and defend in person”); Portuondo v. Agard, 529 U.S. 61, 65 (2000) (articulating Sixth Amendment right to be present); see also Utah Code Ann. § 77-1-6(1)(a) (Supp. 2001) (defendant has right to “appear in person and defend in person”).

Like all rights, the right to be present may be waived by a defendant. See State v.

Anderson, 929 P.2d 1107, 1109–1111 (Utah 1996). However, waiver of the right to be present must be both knowing and voluntary. See State v. Wanosik, 2001 UT App 241, ¶10, 31 P.3d 615, cert. granted, 47 P.3d 951 (Utah 2002). Rule 17 of the Utah Rules of Criminal Procedure codifies both the right to be present and the constitutional requirements for waiver of that right. Rule 17(a) states, in pertinent part, that:

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

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

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

(emphasis added). Thus, in order to find that a defendant has waived the right to be present, either written consent or voluntary absence after notice must be shown.

As to the first exception, written consent, there is no indication in the record that Mr. Zavala-Perez consented, in writing or otherwise, to a trial in his absence. This Court cannot presume such consent based on a silent record.

As to the second exception, a defendant may be tried in absentia if: (1) he receives adequate notice of the time and place of the proceeding; and (2) even after receiving such notice, he is voluntarily absent. See Wanosik, 2001 UT App. 241, ¶10–20. Neither requirement is met in the instant case.

First, the record contains no indication that Mr. Zavala-Perez received any notice

of his November 26, 2001 bench trial. See R. 7–16. The record does show that on September 12 Mr. Zavala-Perez was given notice of his first bench trial setting on October 29, 2001. R. 13–16. However, the record contains no notice for the November 26 bench trial date. Indeed, not only was no official notice of the new date given to Mr. Zavala-Perez, the October 29 bench trial setting was continued by stipulation of counsel without an appearance in court by either counsel or Mr. Zavala-Perez. R. 25–26.

Apparently, defense counsel did make some attempt to contact Mr. Zavala-Perez via telephone regarding the new date, but was unsuccessful. R. 26; 53[1]. Defense counsel admits that he would have been more diligent in attempting to contact Mr. Zavala-Perez regarding the new date, but firmly believed that the bench trial would be stricken and a new jury trial date set. R. 28. Whatever efforts were made by defense counsel were severely hindered by the fact that Mr. Zavala-Perez speaks Spanish and defense counsel did not. R. 26. The only verified contact with Mr. Zavala-Perez was by a Salt Lake Legal Defender Association (“LDA”) interpreter informing him that his trial had been continued to a new date, and that he would be contacted later as to what that new date was. Id. Although the interpreter recalls leaving a message with Mr. Zavala-Perez’ wife regarding the new date, Mr. Zavala-Perez indicates that he never received that message or any other contact from LDA informing him of the date. R. 26. Additionally, even though they had a current address on file, LDA did not send written notice of the new date to Mr. Zavala-Perez. Id. Finally, the record indicates that Mr.

Zavala-Perez made numerous attempts to contact his attorney via telephone leaving a “stack of messages” regarding his case, but that those phone calls were never returned. R. 53[1].

The situation presented above is far removed from the situation addressed in State v. Wagstaff, 772 P.2d 987, 991 (Utah Ct. App. 1989), in which this Court determined that actual notice to the defendant’s attorney resulted in constructive notice to the defendant. In Wagstaff, the defendant intentionally left the state prior to trial. Id. at 990. Furthermore, the defendant’s attorney “went to great lengths to attempt to contact” the defendant, sending numerous written notices of the trial date to every known address of the defendant and the addresses of his relatives. Id.

In contrast to Wagstaff, the record in this case indicates that no actual written notice of the new date was provided to any of the parties involved. R. 7–16. Obviously, counsel for the state and the defense learned of the new date, but neither party was actually served with written notice as required by Rule 3 of the Utah Rules of Criminal Procedure.² Also, there is no indication that Mr. Zavala-Perez had left the state or failed to attempt to contact his attorney. Indeed, the record shows that Mr. Zavala-Perez made

²Rule 3 provides that:

(a) All written motions, notices, and pleadings shall be filed with the court and served on all other parties.

(b) Whenever service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney, unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made in the manner provided in civil actions.

numerous attempts to contact defense counsel. R. 53[1]. Defense counsel failed to return those phone calls and failed to send written notice. R. 26; 53[1]. As such, Mr. Zavala-Perez received neither actual nor constructive notice of his new bench trial date. Absent such notice, Mr. Zavala-Perez cannot be said to have knowingly waived his right to be present. See Wanosik, 2001 UT App. 241, ¶19 n.8 (noting that knowing waiver can be inferred from notice of time and place of proceeding). Therefore, it was error for the trial court to proceed in Mr. Zavala-Perez's absence.

Second, even if Mr. Zavala-Perez received notice of the November 26 bench trial date and had, thus, knowingly failed to appear, the "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." Id. at ¶19 (emphasis in original). In Wanosik, this Court set forth in detail the requirements for a finding that the defendant's absence is voluntary. See id. at ¶¶19–25.³

In general, whether a defendant's absence is voluntary is "determined by considering the totality of the circumstances." Id. at ¶21 (quoting State v. Wagstaff, 772 P.2d 987, 990 (Utah Ct. App. 1989)). Moreover, it is the state's burden to make a

³Although Wanosik deals specifically with only sentencing in absentia, this Court noted that the right to be present is identical with respect to both trial and sentencing. See id. at ¶10 n.1 (noting that there is "no basis on which to distinguish between trial and sentencing in our analysis of a defendant's right to be present and a defendant's voluntary waiver of that right"); see also Utah R. Crim. P. 22(b) ("On the same grounds that a defendant may be tried in defendant's absence, defendant may likewise be sentenced in defendant's absence.").

preliminary showing that the defendant's absence is voluntary. See id. at ¶21. Such a showing must be based upon "reasonable inquiry." Id. at ¶22.

This Court further suggested that such "reasonable inquiry" include:

(1) inquiry of law enforcement agencies to determine whether the defendant is incarcerated; (2) inquiry of local hospitals as to whether the defendant has been admitted to one of them; (3) inquiry of the defendant's employer, if the employer can be readily determined, as to the employer's possible knowledge of the defendant's whereabouts; (4) a reasonably diligent attempt to contact defendant at his residence or other place counsel knows the defendant to frequent; (5) inquiry of Pretrial Services or other entity supervising defendant's presentence release; and (6) inquiry of any bail bond company or other person or entity posting bond to secure defendant's appearance.

Id. at 23 (internal citations omitted).

Once the state has made a "reasonable inquiry" and "compelling reason for the defendant's absence remains unknown, voluntariness, while not guaranteed, may then be properly inferred." Id. Even then, defense counsel must have the opportunity to rebut the state's preliminary showing of voluntariness. See id. at ¶24.

In Wanosik, the defendant was sentenced in absentia after receiving notice of the time and place of the proceeding. Id. at ¶5. The trial court did not inquire nor did the state offer any evidence as to the voluntariness of the defendant's absence. The trial court merely made findings that the defendant had not kept in contact with defense counsel or the trial court. Id. Based on these findings alone, the trial court assumed that the defendant's absence was voluntary. Id. This Court rejected such an assumption, stating that a defendant's failure to maintain contact with counsel or the court indicated

“nothing more than that no one knew why [the defendant] was absent.” Id. at ¶20.

As in Wanosik, none of the procedures outlined by this Court were followed in Mr. Zavala-Perez’ case. The state did not even attempt to make a showing that Mr. Zavala-Perez’ absence was voluntary prior to proceeding with the bench trial. R. 53[1]. Indeed, far from showing that his absence was voluntary, the record actually indicates that Mr. Zavala-Perez was actively attempting to contact his attorney prior to the proceeding. Id. Furthermore, the trial court did not make any findings that his absence was voluntary. Id. The only inquiry made by the trial court was whether the state wished to proceed in Mr. Zavala-Perez’ absence. Id. As such, voluntary absence cannot be assumed and the trial court erred in holding the bench trial in absentia. In the end, neither counsel or the court knew why Mr. Zavala-Perez was absent, and therefore a continuance was appropriate. See State v. Houtz, 714 P.2d 677, 678–79 (Utah 1986).

Additionally, the deprivation of Mr. Zavala-Perez’ right to be present was prejudicial. In Wanosik, the defendant sent a letter to the trial court stating that he had no “legitimate excuse” for his absence from sentencing. Wanosik, 2001 UT App. 241, ¶26. Therefore, this Court determined that the defendant’s absence from sentencing was voluntary and, thus, the trial court’s failure resulted in no prejudice. Id.

Such is not the case here. No subsequent showing has been made that Mr. Zavala-Perez’ absence was voluntary. Also, as Mr. Zavala-Perez and his wife were to be the only defense witnesses, the bench trial in absentia prevented defense counsel

from presenting any evidence or defense in his behalf. R. 28; 53[30]. This is especially important in a DUI trial where no evidence of a chemical test exists. In this class of cases, the state must show that the defendant was “incapable of safely operating” a motor vehicle. Utah Code Ann. §41-6-44 (1999). Such a case rests largely, if not exclusively, upon the defendant’s performance on the standardized field sobriety tests. On cross-examination, defense counsel was able to elicit testimony from the officer that if the tests are not conducted exactly in the proscribed manner, the reliability of the tests is diminished. R. 53[17]. The police officer then testified that the tests he performed on Mr. Zavala-Perez deviated from the standardized manner in which he had been trained to perform those tests—resulting in the tests being less reliable than if they had been performed properly. R. 53[8–24, 31–34].

Given the testimony of the officer and his obvious negligence in the administration of the field sobriety tests, the testimony of Mr. Zavala-Perez and his wife became even more crucial in this instance, and had they been present at the trial, a valid defense to the charges would have been presented. Had Mr. Zavala-Perez or his wife been allowed to testify, they would have been able to offer reasonable and innocent explanations for his performance on the field sobriety tests and the other things testified to by the officer. However, Mr. Zavala-Perez was denied that opportunity. As such, he was prejudiced by the trial court’s decision to proceed in his absence.

In sum, the right of a criminal defendant to be present is guaranteed by both the

state and federal constitutions. That right may be waived only if made both knowingly and voluntarily. At a minimum, knowing waiver requires notice of the time and place of the proceeding. The record is silent as to whether Mr. Zavala-Perez received such notice. Moreover, in order for the trial court to find that a defendant's absence is voluntary, the state must make a preliminary showing based upon "reasonable inquiry." The state made no such showing here and, without such a showing, the trial court may not assume that Mr. Zavala-Perez' absence was voluntary. Finally, the trial court's error in proceeding without Mr. Zavala-Perez was prejudicial as it prevented him from presenting any defense or evidence in his behalf.

II. MR. ZAVALA-PEREZ DID NOT WAIVE EITHER HIS CONSTITUTIONAL OR STATUTORY RIGHTS TO A JURY TRIAL.

A. Mr. Zavala-Perez Did Not Waive His State Constitutional Right to a Jury Trial By Failing to Maintain Contact With His Attorney.

Mr. Zavala-Perez did not waive his right to a jury trial under the Utah Constitution. Under the Sixth Amendment of the United States Constitution, there is no right to a jury trial for "petty offenses." See Blanton v. North Las Vegas, 489 U.S. 538, 541 (1989). For purposes of the right to a jury trial, whether an offense is "petty" is determined according to the severity of the penalty imposed. Specifically regarding DUI charges, the United States Supreme Court has determined that, despite the additional penalties imposed for DUI convictions, they are "petty offenses," and thus, not subject to the Sixth Amendment guarantee of a jury trial. Id. at 542–44.

Nevertheless, the right to a jury trial in all criminal prosecutions, “petty” or not, is guaranteed by the Utah Constitution. Article I, Section 10 of the Utah Constitution provides:

In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded.

The Utah Supreme Court has interpreted Article I, Section 10 as requiring a jury trial in all civil cases. See International Harvester Credit Corp. v. Pioneer Tractor & Implement, Inc., 626 P.2d 418, 421 (Utah 1981). The Court in International Harvester relied heavily upon the actual debates of the drafters of the Utah Constitution. See id. at 419–20. Specifically, the court found that there was a “virtually unanimous intention on the part of the framers of the [Utah] Constitution to preserve a constitutional right to trial by jury in civil cases and in noncapital criminal cases.” Id. at 419. The court further found that “the constitutional designation [in Article I, Section 10] of the number of jurors to be used in courts of original jurisdiction and in courts of inferior jurisdiction presupposes the existence of the basic right itself” Id.

Specifically regarding Mr. Zavala-Perez’ right to a jury trial for a class B misdemeanor, Article I, Section 10 states that “[i]n courts of inferior jurisdiction a jury shall consist of four jurors.” This is especially important in the context of class B and C misdemeanors because those are the only criminal matters tried with four jurors. See

Utah Code Ann. § 78-46-5 (1999). Thus, under the reasoning adopted by the court in International Harvester, that Article I, Section 10 expressly provides for the number of jurors in class B and C misdemeanors shows that the framers of the Utah Constitution intended to secure the right to a jury trial for criminal defendants, such as Mr. Zavala-Perez. As stated by the court, it is not “plausible that the framers would mandate the number of jurors to be used in a jury, and the number of jurors required to return a verdict, without intending to secure the basic right itself.” International Harvester, 626 P.2d at 419; see also State v. Black, 551 P.2d 518, 520 (Utah 1976) (stating “[t]he right guaranteed by the Constitution of Utah is to be tried by a jury”). Therefore, Mr. Zavala-Perez has a right under the Utah Constitution to a jury trial.

In addition to having a right to a jury trial, Mr. Zavala-Perez’ conduct in failing to maintain contact with his attorney is insufficient for waiver of that constitutional right. It is well-established that waiver of a constitutional right must be knowing, intelligent, and voluntary. See Colorado v. Spring, 479 U.S. 564, 579 (1987); Moran v. Burbine, 475 U.S. 412, 421 (1986); Johnson v. Zerbst, 304 U.S. 458, 464 (1938); United States v. Robertson, 45 F.3d 1423, 1431–33 (10th Cir. 1995). Further, the state has a “heavy burden” to show waiver, and courts must “indulge every reasonable presumption against waiver.” Johnson, 304 U.S. at 464.

In order for a court to find that a defendant’s waiver is knowing and intelligent, the “totality of the circumstances” must show that the waiver was made with a “full

awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.” Moran, 475 U.S. at 421. In the instant case, this standard is simply not met. There is no indication in the record that Mr. Zavala-Perez was informed or aware that his right to a jury trial could be waived by failing to maintain contact with his attorney. Absent such a showing, waiver may not be presumed or inferred from a silent record. See Estelle v. Williams, 425 U.S. 501, 527 n.8 (1976); Boykin v. Alabama, 395 U.S. 238, 242–43 (1969); Gideon v. Wainwright, 372 U.S. 335, 369 (1963).

B. MR. ZAVALA-PEREZ DID NOT WAIVE HIS STATUTORY RIGHT TO A JURY TRIAL.

Even if Mr. Zavala-Perez does not have a constitutional right to a jury trial, he does have a statutory right to a jury trial. Further, the trial court erroneously concluded that Mr. Zavala-Perez has waived this statutory right to a jury trial merely by failing to maintain contact with his attorney prior to trial. Under Utah law, criminal defendants have a right to a jury trial in all cases except infractions. See Salt Lake City v. Roseto, 2002 UT App. 66, ¶¶ 8–14, 44 P.3d 835.

Utah Code Ann. § 77-1-6 (1999) provides, in pertinent part:

(1) In criminal prosecutions the defendant is entitled:

....

(f) To a speedy public trial by an impartial jury of the county or district where the offense is alleged to have been committed;

....

(2) In addition:

....

(e) No person shall be convicted unless by verdict of a jury, or upon a plea of guilty or no contest, or upon a judgment of a court when

trial by jury has been waived or, in case of an infraction, upon a judgment by a magistrate.

Rule 17 of the Utah Rules of Criminal Procedure provides, in pertinent part:

(c) All felony cases shall be tried by jury unless the defendant waives a jury in open court with the approval of the court and the consent of the prosecution.

(d) All other cases shall be tried without a jury unless the defendant makes a written demand at least ten days prior to trial, or the court orders otherwise. No jury shall be allowed in the trial of an infraction.

This Court recently held in Roseto that, as long as the requirements of Rule 17(d) are met, a criminal defendant has a right to a jury trial for all misdemeanor and felony cases. See Roseto 2002 UT App. 66, ¶ 11. Here, although no written demand for a jury trial was made, a jury trial was verbally demanded at the pretrial conference and the trial court ordered that a jury trial be set. R. 9–12; 18–19. In addition, on November 20, Mr. Zavala-Perez made a written demand for a jury trial in his motion to strike the bench trial and demand for jury trial. R. 17–20. Even without a written demand, the requirements of Rule 17(d) were met in that “the court order[ed] otherwise.” Once a jury trial has been set by the court, no written demand is necessary. Having met with the requirements of Rule 17(d) and being charged with a misdemeanor, Mr. Zavala-Perez was entitled to a jury trial in this matter. The only question remaining is whether he waived that right.

Although not as strict as the requirements for waiver of a constitutional right, a statutory right cannot be waived unless “the record as a whole reflects the [defendant’s] reasonable understanding of the proceedings and awareness of the right.” State v.

Byington, 936 P.2d 1112, 1117 (Utah Ct. App. 1997) (finding that defendant waived statutory right to counsel where Sixth Amendment right did not apply). Moreover, the defendant must receive at least some admonishments regarding the potential consequences of waiver. Id. (citations omitted).

Here, the record is silent as to Mr. Zavala-Perez' understanding of the proceedings, his awareness of his rights, and any admonishments given by the trial court. The record only shows that Mr. Zavala-Perez failed to contact his attorney prior to his jury trial.⁴ The record does not show that Mr. Zavala-Perez was aware that he had to contact his attorney prior to trial or that failure to do so would result in waiver of his right to a jury trial. As such, waiver, even of a statutory right, may not be presumed. As stated by the Utah Supreme Court, "[t]here is nothing in the record before the Court to show that defendant's statutory right was properly waived by defendant. ... no waiver of a jury was ever made by defendant in open court or on the record. Such waiver will not be presumed from a silent record." State v. Cook, 714 P.2d 296, 297–98 (Utah 1986); see also State v. Williams, 626 P.2d 145, 146 (Ariz. Ct. App. 1987) ("We cannot infer a waiver [of a statutory right] from a silent record."); State v. Warren, 345 S.E.2d 437, 439 (N.C. Ct.

⁴Although not published, this Court's decision in West Valley City v. Bhatia, 2000 UT App. 240 (unpublished memorandum decision) [attached hereto as Addendum "C"], provides direct support for Mr. Zavala-Perez' claim. In Bhatia, the defendant, after complying with the requirements of Rule 17 of the Utah Rules of Criminal Procedure, signed an agreement with the trial court stating that the right to a jury would be waived if he failed to contact his attorney at least two days prior to the trial. This court found such a waiver ineffective.

App. 1986) (holding waiver of a statutory right "cannot be inferred from a silent record").

In sum, Mr. Zavala-Perez has a right to a jury trial under the Utah Constitution, Utah Code Ann. § 77-1-6, and Rule 17 of the Utah Rules of Criminal procedure.

Whatever the source of that right, Mr. Zavala-Perez' failure to maintain contact with his attorney prior to the trial does not operate as a waiver, especially where the record is silent as to his understanding of the right. As such, the trial court's finding of waiver was erroneous and a new jury trial date should be set on remand.

CONCLUSION

Based on the above, Mr. Zavala-Perez respectfully requests that the guilty verdict based upon the bench trial in absentia on November 26 be overturned and that a new trial be scheduled. In addition, Mr. Zavala-Perez respectfully request that a jury trial be scheduled in this matter rather than a new bench trial.

DATED this 14th day of June, 2002.



MICHAEL MISNER
Attorney for Defendant/Appellant



PATRICK W. CORUM
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, MICHAEL MISNER, hereby certify that I have caused to be hand-delivered eight copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, P.O. Box 140320, Salt Lake City, Utah 84114-0230, and four copies to Cara Tangaro, at the District Attorney's Office, 2001 South State Street, Salt Lake City, UT 84190-1200 this 14th day of June, 2002.

A handwritten signature in black ink, appearing to read 'Michael Misner', written over a horizontal line.

MICHAEL MISNER
Attorney for Defendant/Appellant

ADDENDUM A

Third District Court, State of Utah

SALT LAKE COUNTY, SALT LAKE DEPARTMENT
450 South State Street, P.O. Box 1860, Salt Lake City, Utah 84111 - 1860

SENTENCE/JUDGMENT/COMMITMENT/ORDER Criminal/Traffic

BY/STATE

-VS-

Plaintiff

Case Number

015901991

Tape number

C #

Date

1/14/02

Time

Judge/Comm

WILLIAM W. BARRETT

Clerk

huc

Defendant

Plaintiff Counsel

Defense Counsel

Amended

Amended

DB: 1120178

Interpreter

CHARGES gp-dui, gp-speeding,
gp-vehicle unsafe cond.

THE COURT SENTENCED THE DEFENDANT AS FOLLOWS:

Jail

180 + 30 days + 30 days

Suspended

concurrent 178 days + 30 + 30

Defendant to Commence Serving Jail Sentence

Fine Amt. \$

1300

Susp. \$

0000

Fee \$

Fine Bal \$

TOTAL FINE(S) DUE \$

Payment Schedule: Pay \$

100⁰⁰

per month/1st Pmt. Due

3.1.02

Last Pmt. Due

Court Costs \$

Community Service/WP

40 hrs

due 6.14.02

through

00017

Restitution \$

Pay to:

☐ Court

☐ Victim

☐ Show Proof to Court

Attorney Fees \$

Probation

18 month

☒

Good Behavior

☐ AP&P

☐ ACEC

☐ Other

Terms of probation:

☒ No Further Violations

☐ AA Meetings

/ wk

/ month

☐ Follow Program

☐ No Alcohol

☐ Antibuse

☐ Employment

☐ Proof of

Plea in Abeyance Diversion

Review

/ / at

☐ Counseling thru

☒ Classes

ESA dui 1st class 4.14.02

☐ In/Out Treatment

proof of ABC by 4.14.02

☐ Health Testing

☐ Crime Lab Procedure

☐

☐

compliance with the Americans with Disabilities Act, individuals
ding special accommodations (including auxiliary communicative
s and services) during this proceeding should call Third District
irt at 238-7391, at least three working days prior to the proceeding.

PEAL MUST BE FILED WITHIN 30 DAYS OF JUDGEMENT

EREST WILL BE ADDED IF FINE AND/OR RESTITUTION NOT PAID IN FULL TODAY

District Court Judge

STAMP USED AT DIRECTION OF JUDGE

William W. Barrett

ADDENDUM B

NOTES TO DECISIONS

ANALYSIS

Information.
Jurisdiction.
Cited.

Information.

Once the information is authorized, its presentment and filing are not acts that the prosecuting attorney must personally perform. *State ex rel. Cannon v. Leary*, 646 P.2d 727 (Utah 1982).

Jurisdiction.

District judge was magistrate entitled to hold preliminary examinations in case of misdemeanor. *State v. McIntyre*, 92 Utah 177, 66 P.2d 879 (1937).

A justice of the peace has power to issue search warrants. *Allen v. Holbrook*, 103 Utah

319, 135 P.2d 242, modified on rehearing and petition denied, 103 Utah 599, 139 P.2d 233 (1943).

A judge or justice when acting in the role of magistrate was limited to the jurisdiction and powers conferred by law upon magistrates. *Van Dam v. Morris*, 571 P.2d 1325 (Utah 1977).

A judicial officer functioning as a magistrate is not functioning as a circuit court or other court of record. Because magistrates are not courts of record when they conduct preliminary hearings and issue bindover orders, under the current jurisdictional statutes their orders are not immediately appealable. *State v. Humphrey*, 823 P.2d 464 (Utah 1991).

Cited in *State v. Milligan*, 727 P.2d 213 (Utah 1986); *State v. Thomas*, 961 P.2d 299 (Utah 1998).

COLLATERAL REFERENCES

Am. Jur. 2d. — 41 Am. Jur. 2d Indictments and Informations § 1.

C.J.S. — 42 C.J.S. Indictments and Informa-

tions §§ 4, 8; 48A C.J.S. Judges §§ 4, 161; 80 C.J.S. Sheriffs and Constables § 1; 81A C.J.S. States § 139.

77-1-4. Conviction to precede punishment.

No person shall be punished for a public offense until convicted in a court having jurisdiction.

History: C. 1953, 77-1-4, enacted by L. 1980, ch. 15, § 2.

Cross-References. — No person to be de-

prived of life or liberty without due process of law, Utah Const., Art. I, § 7.

77-1-5. Prosecuting party.

A criminal action for any violation of a state statute shall be prosecuted in the name of the state of Utah. A criminal action for violation of any county or municipal ordinance shall be prosecuted in the name of the governmental entity involved.

History: C. 1953, 77-1-5, enacted by L. 1980, ch. 15, § 2.

Cross-References. — Prosecutions to be

conducted in name of "the State of Utah," Utah Const., Art. VIII, § 16.

COLLATERAL REFERENCES

C.J.S. — 22 C.J.S. Criminal Law § 21.

77-1-6. Rights of defendant.

- (1) In criminal prosecutions the defendant is entitled:
 - (a) To appear in person and defend in person or by counsel;
 - (b) To receive a copy of the accusation filed against him;

- (c) To testify in his own behalf;
 - (d) To be confronted by the witnesses against him;
 - (e) To have compulsory process to insure the attendance of witnesses in his behalf;
 - (f) To a speedy public trial by an impartial jury of the county or district where the offense is alleged to have been committed;
 - (g) To the right of appeal in all cases; and
 - (h) To be admitted to bail in accordance with provisions of law, or be entitled to a trial within 30 days after arraignment if unable to post bail and if the business of the court permits.
- (2) In addition:
- (a) No person shall be put twice in jeopardy for the same offense;
 - (b) No accused person shall, before final judgment, be compelled to advance money or fees to secure rights guaranteed by the Constitution or the laws of Utah, or to pay the costs of those rights when received;
 - (c) No person shall be compelled to give evidence against himself;
 - (d) A wife shall not be compelled to testify against her husband nor a husband against his wife; and
 - (e) No person shall be convicted unless by verdict of a jury, or upon a plea of guilty or no contest, or upon a judgment of a court when trial by jury has been waived or, in case of an infraction, upon a judgment by a magistrate.

History: C. 1953, 77-1-5, enacted by L. 1980, ch. 15, § 2.

Cross-References. — Attorneys, rights in disbarment proceedings, § 78-51-16.

Constitutional rights of accused, Utah Const., Art. I, § 12.

Counsel for indigents, § 77-32-301 et seq.

Discharge of defendant turned state's witness, § 77-17-2.

Dismissal without trial, Rule 25, U.R.Cr.P.

Due process of law, Utah Const., Art. I, § 7.

Errors and defects not affecting substantial rights disregarded, Rule 30, U.R.Cr.P.

Husband or wife not competent witness against or for each other without consent, exceptions, § 78-24-8.

Jury trial and waiver thereof, Utah Const., Art. I, § 10; Rule 17, U.R.Cr.P.

Lineup procedures, § 77-8-1 et seq.

Multiple prosecutions and double jeopardy, § 76-1-401 et seq.

Ordinance violation cases, jeopardy in, § 10-7-65.

Subpoena for witnesses for impecunious defendant in criminal case, § 21-5-14.

NOTES TO DECISIONS

ANALYSIS

Appearance at trial in prison clothing.

— Waiver.

Confrontation of witness.

— Depositions.

— Right to interpreter.

— Stipulation of testimony.

— Testimony of accessory at former trial.

— Testimony at preliminary hearing.

Copy of accusation.

— Bill of particulars.

Double jeopardy.

— Retrial proper.

— Sentencing.

— Separate offenses.

— Waiver.

Fee before final judgment.

Jury trial.

— Impartial jury.

Preliminary hearing.

Presence at trial.

— Waiver.

Public trial.

Right to appeal.

Right to counsel.

— Waiver.

Self-incrimination.

— Claiming and waiving privilege.

— Confessions.

Speedy trial.

— Delays by defendant.

— Federal custody.

— Thirty-day requirement.

— Waiver.

requested or must identify explicitly those portions of the request with respect to which no responsive material will be provided. Secondly, when the prosecution agrees to produce any of the material requested, it must continue to disclose such material on an ongoing basis to the defense. *State v. Knight*, 734 P.2d 913 (Utah 1987).

Witnesses.

A circuit court judge acted well within his discretion in ordering the state to disclose the identity of a witness and the details of a criminal transaction the circuit court found to be material to a pending criminal prosecution, where the state itself provided "good cause," for purposes of Subdivision (a)(5), by representing that it needed to keep defendant's money to use at trial, when the only logical use of the money would of necessity entail proof of the details of the transaction in which the informant was involved. *Cannon v. Keller*, 692 P.2d 740 (Utah 1984).

After the defendant injected a degree of surprise into the proceedings, the State reacted properly by contacting a rebuttal witness known to have some expertise in the relevant area and notifying defense counsel as soon as possible who he was and what his general purpose would be. Therefore, the state was not precluded from calling this rebuttal witness not disclosed before trial in circumstances where it, in good faith, had no reason to expect the need for the witness before trial. *State v. Tennyson*, 850 P.2d 461 (Utah Ct. App. 1993).

Cited in *State v. Fierst*, 692 P.2d 751 (Utah 1984); *State v. Collier*, 736 P.2d 231 (Utah 1987); *State v. Griffiths*, 752 P.2d 879 (Utah 1988); *State v. Bishop*, 753 P.2d 439 (Utah 1988); *State v. Sawyers*, 819 P.2d 806 (Utah Ct. App. 1991); *State v. Menzies*, 889 P.2d 393 (Utah 1994); *State v. Vargas*, 2001 UT 5, 20 P.3d 271.

COLLATERAL REFERENCES

Utah Law Review. — Comment, Confrontation Rights and Preliminary Hearings, 1986 Utah L. Rev. 75.

C.J.S. — 22A C.J.S. Criminal Law § 486 et seq.

A.L.R. — Right of accused in state courts to inspection or disclosure of evidence in possession of prosecution, 7 A.L.R.3d 8.

Right of defendant in criminal case to inspection of statement of prosecution's witness for purposes of cross-examination or impeachment, 7 A.L.R.3d 181.

Accused's right to inspection of minutes of state grand jury, 20 A.L.R.3d 7.

Interference by prosecution with defense counsel's pretrial interrogation of witnesses, 90 A.L.R.3d 1231.

Accused's right to discovery or inspection of "rap sheets" or similar police records about prosecution witnesses, 95 A.L.R.3d 832.

Accused's right to depose prospective witnesses before trial in state court, 2 A.L.R.4th 704.

Sanctions against defense in criminal case for failure to comply with discovery requirements, 9 A.L.R.4th 837.

Right of accused in state courts to inspection or disclosure of tape recording of his own statements, 10 A.L.R.4th 1092.

Necessity or permissibility of mental examination to determine competency or credibility of complainant in sexual offense prosecution, 45 A.L.R.4th 310.

What is accused's "statement" subject to state court criminal discovery, 57 A.L.R.4th 827.

Criminal law: dog scent discrimination line-ups, 63 A.L.R.4th 143.

Right of defendant in criminal contempt proceeding to obtain information by deposition, 33 A.L.R.5th 761.

Illegal drugs or narcotics involved in alleged offense as subject to discovery by defendant under Rule 16 of Federal Rules of Criminal Procedure, 109 A.L.R. Fed. 363.

Rule 17. The trial.

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

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

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

(3) The court may exclude or excuse a defendant from trial for good cause shown which may include tumultuous, riotous, or obstreperous conduct.

Upon application of the prosecution, the court may require the personal attendance of the defendant at the trial.

(b) Cases shall be set on the trial calendar to be tried in the following order:

(1) misdemeanor cases when defendant is in custody;

- (2) felony cases when defendant is in custody;
- (3) felony cases when defendant is on bail or recognizance; and
- (4) misdemeanor cases when defendant is on bail or recognizance.
- (c) All felony cases shall be tried by jury unless the defendant waives a jury in open court with the approval of the court and the consent of the prosecution.
- (d) All other cases shall be tried without a jury unless the defendant makes written demand at least ten days prior to trial, or the court orders otherwise. No jury shall be allowed in the trial of an infraction.
- (e) In all cases, the number of members of a trial jury shall be as specified in Section 78-46-5, U.C.A. 1953.
- (f) In all cases the prosecution and defense may, with the consent of the accused and the approval of the court, by stipulation in writing or made orally in open court, proceed to trial or complete a trial then in progress with any number of jurors less than otherwise required.
- (g) After the jury has been impaneled and sworn, the trial shall proceed in the following order:
 - (1) The charge shall be read and the plea of the defendant stated;
 - (2) The prosecuting attorney may make an opening statement and the defense may make an opening statement or reserve it until the prosecution has rested;
 - (3) The prosecution shall offer evidence in support of the charge;
 - (4) When the prosecution has rested, the defense may present its case;
 - (5) Thereafter, the parties may offer only rebutting evidence unless the court, for good cause, otherwise permits;
 - (6) When the evidence is concluded and at any other appropriate time, the court shall instruct the jury; and
 - (7) Unless the cause is submitted to the jury on either side or on both sides without argument, the prosecution shall open the argument, the defense shall follow and the prosecution may close by responding to the defense argument. The court may set reasonable limits upon the argument of counsel for each party and the time to be allowed for argument.
- (h) If a juror becomes ill, disabled or disqualified during trial and an alternate juror has been selected, the case shall proceed using the alternate juror. If no alternate has been selected, the parties may stipulate to proceed with the number of jurors remaining. Otherwise, the jury shall be discharged and a new trial ordered.
- (i) When in the opinion of the court it is proper for the jury to view the place in which the offense is alleged to have been committed, or in which any other material fact occurred, it may order them to be conducted in a body under the charge of an officer to the place, which shall be shown to them by some person appointed by the court for that purpose. The officer shall be sworn that while the jury are thus conducted, he will suffer no person other than the person so appointed to speak to them nor to do so himself on any subject connected with the trial and to return them into court without unnecessary delay or at a specified time.
- (j) At each recess of the court, whether the jurors are permitted to separate or are sequestered, they shall be admonished by the court that it is their duty not to converse among themselves or to converse with, or suffer themselves to be addressed by, any other person on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them.
- (k) Upon retiring for deliberation, the jury may take with them the instructions of the court and all exhibits which have been received as evidence, except exhibits that should not, in the opinion of the court, be in the possession of the jury, such as exhibits of unusual size, weapons or contraband. The court shall permit the jury to view exhibits upon request. Jurors are entitled to take notes during the trial and to have those notes with them during deliberations.

As necessary, the court shall provide jurors with writing materials and instruct the jury on taking and using notes.

(l) When the case is finally submitted to the jury, they shall be kept together in some convenient place under charge of an officer until they agree upon a verdict or are discharged, unless otherwise ordered by the court. Except by order of the court, the officer having them under his charge shall not allow any communication to be made to them, or make any himself, except to ask them if they have agreed upon their verdict, and he shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed upon.

(m) After the jury has retired for deliberation, if they desire to be informed on any point of law arising in the cause, they shall inform the officer in charge of them, who shall communicate such request to the court. The court may then direct that the jury be brought before the court where, in the presence of the defendant and both counsel, the court shall respond to the inquiry or advise the jury that no further instructions shall be given. Such response shall be recorded. The court may in its discretion respond to the inquiry in writing without having the jury brought before the court, in which case the inquiry and the response thereto shall be entered in the record.

(n) If the verdict rendered by a jury is incorrect on its face, it may be corrected by the jury under the advice of the court, or the jury may be sent out again.

(o) At the conclusion of the evidence by the prosecution, or at the conclusion of all the evidence, the court may issue an order dismissing any information or indictment, or any count thereof, upon the ground that the evidence is not legally sufficient to establish the offense charged therein or any lesser included offense.

(Amended effective November 1, 2001.)

Advisory Committee Note. — Paragraph (k). The committee recommends amending paragraph (k) to establish the right of jurors to take notes and to have those notes with them during deliberations. The committee recommends removing depositions from the paragraph not in order to permit the jurors to have depositions but to recognize that depositions are not evidence. Depositions read into evidence will be treated as any other oral testimony. These amendments and similar amendments to the Rules of Civil Procedure will make the two provisions identical.

Amendment Notes. — The 2001 amendment made one stylistic change in Subdivision (g) and rewrote Subdivision (k).

Cross-References. — Capital felony, penalty, execution of penalty, §§ 76-3-206, 76-3-207, 77-19-1 et seq.

Fees, payment by state in criminal cases, § 21-6-5.

Husband and wife as witness for or against each other, Utah Const., Art. I, Sec. 12: §§ 77-1-6, 78-24-8.

Jurors and jury, § 78-46-1 et seq.

Report of testimony of witness taken at preliminary examination as admissible, Rule 7.

Right to jury trial, Utah Const., Art. I, Sec. 10; § 77-1-6.

When judgment rendered, Rule 22.

When verdict rendered, Rule 21.

NOTES TO DECISIONS

Contact with jurors.

III, disabled, or disqualified jurors.

—Agreement to proceed.

—Challenges to new juror.

—Continuance.

Jury deliberations.

—Deadlock juries.

—Discharge.

—Instruction.

—Outside communications.

—Physical evidence.

—Requests for further instructions.

—Absence of counsel.

—Absence of defendant.

—Written response.

—Requests for re-reading of testimony.

Jury views.

Motions for directed verdict.

Presence at trial.

—Absence due to counsel error.

—Court ordered removal.

—Defendant in custody.

—Jury instruction.

—Motions and pleas.

—Voluntary absence.

—Waiver.

—Intoxication.

Trial by jury.

—Failure of defendant to waive.

—Request by defendant.

—Refusal.

—Request by prosecutor.

Rule 21.5. Repealed.

Repeals. — Rule 21.5, establishing procedure for pleas claiming mental illness or insanity, was repealed effective January 1, 1996. For similar provisions, see § 77-16a-103.

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.)

Cross-References. — Pre-sentence investigation, § 76-3-404.
Rules of evidence inapplicable to sentencing and probation proceedings, Rule 1101, U.R.E.
Suspending imposition of sentence and placing defendant on probation, § 77-18-1.

NOTES TO DECISIONS

Advising defendant of right to appeal.
Appellate review.
Delay reasonable.
Illegal sentence.
Jurisdiction.
Res judicata.
Sentences.
— Habitual offenders.
— Indefinite suspension of sentence.
Sentencing hearing.
— Continued hearing.
— Evidence.
— Delinquency record.
— Polygraph examination.
— Presentence report.
— Presence of counsel.

— Presence of defendant.
— Time.
— Continuance for defendant.
— Waiver.
— Waiver of rights.
Statements before sentencing.
— Defendant.
Validity of conviction.
Cited.

Advising defendant of right to appeal.

Trial court's failure to again advise defendant of his right to appeal at sentencing was harmless error where trial court had informed him of such right at the trial and after the verdict, and he did not object to the timeliness of the court's

ADDENDUM C

Not Reported in P.2d
2000 UT App 240
(Cite as: 2000 WL 33244131 (Utah App.))

UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.

Court of Appeals of Utah.

WEST VALLEY CITY, Plaintiff and Appellee,
v.
Jasbir Singh BHATIA, Defendant and Appellant.

No. 990249-CA.

Aug. 3, 2000.

Jeffrey C. Howe, Salt Lake City, for appellant.

J. Richard Catten, West Valley City, for appellee.

Before BENCH, BILLINGS, and DAVIS, JJ.

MEMORANDUM DECISION

PER CURIAM.

*1 Absent evidence in the record of affirmative, knowing and intelligent action by [defendant] that might reasonably be construed as a waiver, we must conclude that there has been no waiver and [defendant] was entitled to be represented by counsel at trial even if he chose not to be there himself.

Wagstaff v. Barnes, 802 P.2d 774, 779 (Utah Ct.App.1990). There is nothing in the record to indicate that Bhatia took affirmative, knowing, and intelligent action to waive representation. In fact, West Valley concedes that the trial court erred in concluding Bhatia waived his right to counsel. West Valley goes on to argue that this error can be corrected by resentencing Bhatia to no jail time. We disagree. Because he was sentenced to jail, Bhatia was entitled to counsel absent a proper waiver. See Layton v. Longcrier, 943 P.2d 655, 658 (Utah Ct.App.1997) (interpreting Scott v. Illinois, 440 U.S. 367, 99 S.Ct. 1158 (1979) as imposing after-the-fact test to determine if person charged with misdemeanor is entitled to counsel).

The trial court also concluded that Bhatia waived his right to a jury trial by signing an agreement to waive his

right to a jury if he did not contact his attorney two days before trial. This purported waiver was not sufficient. Bhatia made a written demand for a jury trial in accordance with Utah Rule of Criminal Procedure 17(3)(d). There is insufficient evidence in the record to suggest he knowingly and intelligently waived a jury trial. See State v. Moosman, 794 P.2d 474, 477 (Utah 1990) (stating defendant must understand nature and extent of waiver of jury trial and waiver must be informed and knowledgeable).

Accordingly, we reverse the trial court's determination that Bhatia waived his right to counsel and a jury trial and remand the case for such further proceedings as may now be proper.

END OF DOCUMENT