

2002

Utah v. Jeffery Randall Smit aka Jeffery Randall Cates : Brief of Appellant

Utah Court of Appeals

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~~Utah Court of Appeals~~

IN THE UTAH COURT OF APPEALS

SEP - 8 2003

Paulette Stagg
Clerk of the Court

STATE OF UTAH,

Plaintiff and Appellee,

vs.

JEFFREY RANDALL SMIT, aka
JEFFREY RANDALL CATES

Defendant and Appellant.

APPELLANT'S BRIEF

Case No. 20020505-CA

District Ct. Case No. 011200900
District Ct, Judge Joseph C. Fratto, Jr.

Argument Priority 2

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JURISDICTIONAL STATEMENT

Jurisdiction of the Third Judicial District Court, Salt Lake County, Utah, from which this appeal arises, is based on U.C.A. § 78-3-4(1) (1953 as amended). Jurisdiction to hear this appeal is conferred upon the Utah Court of Appeals pursuant to U.C.A. § 78-2a-3(2)(e) and Rule 3(a) of the Utah Rules of Appellate Procedure.

ISSUES PRESENTED

1. Did the State of Utah fail to comply with its plea agreement with defendant Jeffrey Smit where the plea agreement read, “the State will recommend that any sentence imposed be suspended and that I be granted probation,” where Mr. Smit’s attorney represented to the court, without objection from the prosecutor, that the State was not seeking jail time, where the State, through the prosecutor and through State of Utah Adult Probation and Parole, thereafter recommended Mr. Smit serve three months in jail to “give him a wake up call,” and where the prosecutor, after an objection from Mr. Smit’s attorney, stated, “the State is prepared to withdraw its recommendation of—affirmative recommendation for jail?”

This issue was preserved for appeal in Mr. Smit’s Motion to Withdraw Plea and the hearing on that motion, R. at 82; R. at 320.

Standard of Review: Review of trial court’s legal determinations is for correctness, granting no deference to the trial court. Jones, Waldo, Holbrook & McDonough v. Dawson, 923 P.2d 1366 (Utah 1996). Whether a particular breach is

material is a conclusion of law to be reviewed independently. Saunders v. Sharp, 840 P.2d 796 (Utah App. 1992).

2. Does the phrase, “the State will recommend that any sentence imposed be suspended and that I be granted probation” allow the state to recommend jail time as a term of probation?

This issue was preserved for appeal in Mr. Smit’s Motion to Withdraw Plea and the hearing on that motion, R. at 82; R. at 320.

Standard of Review: Review of trial court’s legal determinations is for correctness, granting no deference to the trial court. Jones, Waldo, Holbrook & McDonough v. Dawson, 923 P.2d 1366 (Utah 1996).

3. Does noncompliance by the State of its plea agreement with Mr. Smit serve as “good cause” to allow Mr. Smit to withdraw his plea agreement?

This issue was preserved for appeal in Mr. Smit’s Motion to Withdraw Plea and the hearing on that motion, R. at 82; R. at 320.

Standard of review: An appellate court “will not interfere with a trial judge’s determination that a defendant has failed to show good cause unless it clearly appears that the trial judge abused his discretion.” State v. Mildenhall, 747 P.2d 422 (Utah 1987). An appellate court “will not disturb the trial court’s denial of a motion to withdraw a guilty plea unless it clearly appears that the trial court has exceeded its permitted range of discretion.

4. Did the trial court fail to strictly comply with Rule 11 of the Utah Rules of Criminal Procedure when it failed to divulge the maximum sentence of jail time

defendant could serve as part of probation, where the court did divulge the maximum imprisonment term of the specific charge, being five years, but where the court knew the defendant qualified for probation and also had signed a plea agreement where the prosecution promised to recommend probation, and where the court acknowledged that the two types of imprisonment were distinct and separate?

This issue was not preserved for appeal at the trial court, but it is argued herein that the court committed plain error.

Standard of Review: Whether the trial court committed plain error by accepting a guilty plea without conducting an appropriate and required colloquy is a question of law that is reviewed for correctness. State v. Tarnawiecki, 2000 Utah Ct. App. 186, 5 P.3d 1222 (Utah App. 2000). “The ultimate question of whether the trial court strictly complied with constitutional and procedural requirements for entry of a guilty plea is a question of law that is reviewed for correctness.” State v. Ostler, 2000 Utah Ct. App. 028, 996 P.2d 1065 (Utah App. 2000).

DETERMINATIVE STATUTES AND RULES

Rule 11(e), Utah Rules of Criminal Procedure

The court may refuse to accept a plea of guilty, no contest or guilty and mentally ill, and may not accept the plea until the court has found: . . .

(e)(5) the defendant knows the minimum and maximum sentence, and if applicable, the minimum mandatory nature of the minimum sentence, that may be imposed for each offense to which a plea is entered, including the possibility of the imposition of consecutive sentences;

§77-18-1 (8)(a), Utah Code Annotated

While on probation, and as a condition of probation, the court may require that the defendant: (a) perform any or all of the following:

- (i) pay, in one or several sums , any fine imposed at the time of being placed on probation
- (ii) pay amounts required under Title 77, Chapter 32a, Defense Costs;
- (iii) provide for the support of others for whose support his is legally liable;
- (iv) participate in available treatment programs;
- (v) serve a period of time, not to exceed one year, in a county jail designated by the department, after considering any recommendation by the court as to which jail the court finds most appropriate;
- (vi) participate in compensatory service restitution programs, including the compensatory service program provided in Section 78-11-20.7;
- (viii) pay for the costs of investigation, probation, and treatment services;
- (ix) make restitution or reparation to the victim or victims with interest in accordance with Subsection 76-3-201(4); and
- (x) comply with other terms and conditions the court considers appropriate.

§76-3-203(2), Utah Code Annotated

A person who has been convicted of a felony may be sentenced to imprisonment for an indeterminate term as follows: . . .

- (c) In the case of a felony of the third degree, for a term not to exceed five years, but if the trier of fact finds beyond a reasonable doubt that a dangerous weapon was used in the commission or furtherance of the felony, the court shall sentence the person convicted for a term of not less than one year nor more than five years, and the court may sentence the person convicted for a term of not less than one year nor more than ten years.

§76-3-208, Utah Code Annotated

(1) persons sentenced to imprisonment shall be committed to the following custodial authorities:

- (a) felony commitments shall be to the Utah State Prison;

§77-13-6, Utah Code Annotated

(2) A plea of guilty or no contest may be withdrawn only upon good cause shown and with leave of the court.

STATEMENT OF THE CASE

Course of Proceedings

Jeffrey Smit was charged by the State of Utah with two counts of criminal non-support, a third degree felony. R. at 5. Mr. Smit pled “not guilty.” R. at 46. The State and Mr. Smit entered into a plea agreement whereby Mr. Smit would change his plea of “not guilty” to “guilty” to one count of criminal non-support. R. at 55. The court accepted the plea. R. at 317. Mr. Smit was sentenced to, among other things, 90 days in jail as part of probation. R. at 318, p. 9, lines 16-17. Mr. Smit motioned to withdraw his plea based on the failure by the state to comply with the plea agreement. R. at 82; R. at 320. That motion was denied. R. at 122. This appeal then ensued. R. at 123.

Statement of Relevant Facts

Jeffrey Smit was charged by the State of Utah with two counts of criminal non-support, a third degree felony. R. at 5. Mr. Smit pled “not guilty.” R. at 46. After negotiations, the State and Mr. Smit entered into a plea agreement whereby Mr. Smit would change his plea of “not guilty” to “guilty” to one count of criminal non-support. Additionally the State would recommend that “any sentence imposed be suspended and that [Mr. Smit] be granted probation.” R. at 60. The court accepted the plea. R. at 317.

At the time the court accepted the plea, it advised Mr. Smit the maximum prison sentence was five years, but made no mention of the one-year maximum jail sentence if he received probation. R. at 317, p. 5, lines 15-17. Also at the plea agreement the court asked if anything had been promised in return for the guilty plea. R. at 317, p. 5, line 22 – p. 6, line 6. In response, Mr. Smit’s attorney, Mr. Heineman, explained “the State is

not seeking any jail time in sentencing in this matter,” without any objection from the prosecutor. R. at 317, p. 6, lines 15-17.

Two months later, at the sentencing hearing, State of Utah Adult Probation and Parole recommended Mr. Smit serve three months in jail. R. at 65, p. 11. Heineman objected to the recommendation as being in violation of the plea agreement, but again, the prosecutor said nothing. R. at 319, p. 6, line 24 – p. 7, line 4. Later in the sentencing hearing, after the prosecutor had put forward the evidence against Mr. Smit, she recommended Mr. Smit “do a minimum of at least three months, if not six months in jail. That will give him a chance to think about what has happened, to give him a wake up call that this is an important area that he needs to take care of.” R. at 319, p. 6 line 24 – p. 7, line 3. Again Heineman objected and the court took a break for the parties too review the audio tape of the Change-of-Plea hearing. R. at 319, p. 16, line 14 – p. 17, line 5.

During the break only Heineman reviewed the tape. R. at 318, p. 2, lines 19-24. When Heineman offered to play it, the prosecutor said, “Your Honor, the state is prepared to withdraw its recommendation of—affirmative recommendation for jail.” R. at 318, p. 3, lines 1-5. Mr. Smit was sentenced to, among other things, 90 days in jail as part of probation. R. at 318, p. 9, lines 16-17.

Mr. Smit motioned to withdraw his plea based on the failure by the state to comply with the plea agreement. R. at 82; R. at 320. That motion was denied for lack of good cause. R. at 122. This appeal then ensued. R. at 123.

SUMMARY OF ARGUMENTS

The trial court wrongfully accepted Jeffrey Smit's guilty plea and wrongfully denied his motion to withdraw his plea for two reasons. First the State failed to comply with its promises contained in the plea agreement. Specifically, it recommended Mr. Smit serve time in jail despite a promise not to make such a recommendation. Second, the court failed to advise Mr. Smit of the maximum sentence of one year in jail if put on probation.

The State's promise not to recommend jail was clear both from the plea agreement itself, where it affirmed the State would recommend that any sentence imposed be suspended and that Mr. Smit be granted probation, and from the Change-of-Plea hearing, where Heineman explained, without objection from the prosecutor, that the State was not seeking jail time.

The State clearly violated the agreement when first, State of Utah Adult Probation and Parole recommended Mr. Smit serve three months in jail, and second, when the prosecutor recommended Mr. Smit serve at least three months, if not six months in jail, and she gave reasons why he should spend time in jail. Such a breach of the agreement could not simply be corrected by the prosecutor's later statement that the State was prepared to withdraw the jail recommendation. It was an abuse of the court's discretion not to allow Mr. Smit to withdraw his plea after such great breach of the agreement.

Finally, because it was possible that Mr. Smit be sentenced to jail as part of probation, the court erred in failing to advise him of the maximum sentence he could serve as part of that probation. Thus. Mr. Smit had good cause to withdraw his plea.

ARGUMENT

The trial court wrongfully accepted Jeffrey Smit's guilty plea and wrongfully denied his motion to withdraw his plea for two reasons. First, after the State entered into a plea agreement with Mr. Smit whereby the State would recommend a suspended sentence and probation, and after Mr. Smit's attorney explained to the court that the State was not seeking jail time for Mr. Smit, and the State did not object, the State vehemently recommended Mr. Smit serve at least three months in jail, even though the prosecutor later told the court she was prepared to withdraw the recommendation. Second, the trial court failed to explain to Mr. Smit that he could receive a maximum sentence of one year in jail as part of probation, in violation of Utah law and the United States Constitution.

1. THE STATE FAILED TO COMPLY WITH THE PLEA AGREEMENT

Before determining whether the State breached the agreement, the Court must first understand what the terms of the agreement are.

A. The state promised, at the least, not to recommend jail.

The State of Utah, represented by Janise Macanas, the prosecutor, entered into a plea agreement with Mr. Smit, dated March 12, 2002, whereby Mr. Smit would change his plea in this case from "not guilty" to "guilty." R. at 55.

The plea agreement (also called "statement in advance of plea") reads,

"I [Jeff Smit]¹ will plead guilty to the Count 1 of the Information and agree that victim restitution be entered in the total amount of my child support arrears for Count 1 and Count II for my children as of the date

¹ Although the plea agreement reads as though Mr. Smit wrote it, the agreement was in fact written by the prosecutor for the State of Utah and signed by her on behalf of the State. R. at 55.

sentence is imposed. In return, the *State will recommend that any sentence imposed be suspended and that I be granted probation*. Further, upon my successful completion of probation, the State will join in a motion to reduce the degree of my conviction to that of a class “A” misdemeanor.” (R. at 60; *emphasis added*).

At the Change-of-Plea Hearing, which occurred on the same day the plea agreement was signed, Mr. Smit’s attorney Robert Heineman explained what the State had promised. The discussion proceeded as follows:

“The Court: Ms. Macanas. What is anticipated?

Mr. Heineman: We have a disposition in this particular matter. What’s contemplated is that on a plea of guilty to Count 1, the State will dismiss Count 2. (R. at 317, p. 2, lines 8 – 12).

...

The Court: Has anyone threatened you to get you to enter this plea? Coerced you in some way?

Mr. Smit: No

The Court: Promised you something? In terms of your agreement with the State of Utah, other than dismissing Count 2 if you pled guilty to Count 1, is there anything further to the agreement?

Mr. Heineman: There are a couple of things, your Honor.

The Court: Yes.

Mr. Heineman: One is that Alex Beesley is willing to waive interest if there’s a lump sum payment of all arrearages within the year.

Additionally, the State has agreed that if he successfully completes probation, they would stipulate to a 402 reduction in Class A misdemeanor, and additionally, the *State is not seeking any jail time in sentencing in this matter*. (R. at 317, p. 5, line 25 – p. 6, line 17; *emphasis added*).

...

Ms. Macanas: Your Honor, just for clarification also.

The Court: Yes.

Ms. Macanas: Although Count 2 is being dismissed, the defendant has agreed to pay restitution on those as well.” (R. at 317, p. 7, lines 4 – 8).

Macanas made no further clarifications of Heineman’s explanation of the plea agreement.

At the sentencing hearing, both the prosecutor and State of Utah Adult Probation and Parole (hereinafter, “UAP&P”) recommended Mr. Smit serve three months in jail, UAP&P’s recommendation being couched in terms of a condition of probation. (R. at 319, p. 14, line 24 – p. 15, line 3; R. at 65, p. 11). After Mr. Smit complained about the State’s recommendation for jail time as being in violation of the plea agreement, the court stated,

“I think that the agreement was—and I’m looking at the statement in advance of plea, that any sentence imposed be suspended and that I be granted probation. That does not in fact, of course, being granted probation implies that there would be conditions of probation and one of the conditions that I thought appropriate was this jail time; but I think beyond that—so, I disagree with your interpretation that a recommendation to suspend the sentence would be a recommendation to suspend going to prison. And there is nothing said here in terms of any recommendations for the particular conditions of probation.” R. at 320, p. 8, lines 1-12.

The court further explained,

“As I say, the way I see it happening here and the facts as I see it and what I would find is that the initial bargain or at least the one expressed in the statement in advance of plea was that their recommendation should be—would be to suspend the jail sentence. That’s separate and apart from the conditions of probation, making recommendations for the conditions of probation. R. at 320, p. 10, line 25 – p. 11, line 6.

Moreover the court stated,

“that a recommendation to suspend the jail sentence, or to suspend the sentence can only be interpreted to mean to suspend the prison

sentence, not to send the defendant to prison. It does not deal with the conditions of probation. This jail sentence that I've imposed is a condition of probation." R. at 320, p. 12, lines 1 – 7.

In other words, a promise by the State to recommend a suspended sentence and probation does not prohibit the state from recommending jail as part of the probation. The court also makes a distinction between "prison" and "jail," and associates the promise to recommend a "suspended sentence" only with a promise to recommend suspending a prison sentence, not with a promise to recommend suspending a jail sentence.

The trial court did find, however, the State had promised to recommend Mr. Smit's probation not include jail, based on the uncontested comment of Heineman at the Change-of-Plea hearing, as quoted above. R. at 318, p. 3, lines 6-11. At the hearing on Mr. Smit's motion to withdraw the plea, the court explained,

"however—and I do recall this, apparently what happened was that at the time the plea was taken, the State had said some things in addition to what was said in the statement in advance of plea. And those comments—and maybe they were and maybe they weren't intended as such—but they did—it would indicate that they were not going to recommend, or they were going to recommend maybe affirmatively no jail time, which would include conditions of probation that would be jail time. R. at 320, p. 8, lines 13 – 20

continuing, the court stated,

"During the hearing, further things were said that changed that recommendation, that their recommendation really was going to be also that as one of the conditions of probation should not be jail." R. at 320, p. 11, lines 7-10.

The court also reasoned,

"however, in this case, representations were made at the time of taking the plea that added to this written agreement, and that was clarified; indeed, the State had—and Mr. Heineman pointed that out at the time, that

their recommendation really was or was that the bargain—the agreement was that their recommendation was going to be no jail sentence as one of the conditions of probation.” R. at 320, p. 12, lines 1 – 7.

The State having promised not to recommend jail, the question turns to whether the State fulfilled that promise.

B. The State did not fulfill its obligations to Mr. Smit

Both the prosecutor and UAP&P recommended Mr. Smit serve three months in jail. R. at 318, p. 14, line 24 – p. 15, line 3; R. at 65, p. 11. Although the prosecutor later said she was prepared to withdraw the recommendation, her actions and arguments to that point, and even her supposed withdrawal of the recommendation, constitute noncompliance with the agreement, both in terms of contract law and constitutional law.

1. The State of Utah “breached” the agreement.

As stated above, the trial court held although the plea agreement by itself did not prevent the State from recommending jail as part of Mr. Smit’s probation, the uncontested statement of Heineman at the Change-of-Plea hearing did, which means at the moment UAP&P sent its recommendation that Mr. Smit serve three months in jail, the State violated the agreement. R. at 65, p. 11. State of Utah Adult Probation and Parole is undoubtedly an agency of the State of Utah and was bound by the agreement. If it were not bound, it would have been excepted from the agreement, as the judge was excepted. R. at 60.

Also, at the moment the prosecutor recommended three to six months in jail, the State again violated the agreement. R. at 319, p. 14, lines 24-25. And when the prosecutor gave several reasons why Mr. Smit should go to jail, including, to “give him a

chance to think about what has happened,” and to “give him a wake up call” (R. at 319, p. 15, lines 1-2), the prosecutor breached the agreement so far it could not possibly be repaired (even if the State had a right to repair the breach). The prosecutor somewhat attempted to cure the breach by telling the court, “the State is prepared to withdraw its recommendation of—affirmative recommendation for jail,” (R. at 318, p. 3, lines 3-5) after Heineman objected. Yet the prosecutor’s statement itself, with the word, “prepared,” demonstrates a reluctance to withdraw the jail recommendation.

That one line is the only evidence in the record that the State attempted to comply in some way with its obligation not to recommend jail. It was evidently insufficient to erase in the court’s consciousness the State’s real recommendation. At the hearing on the motion to withdraw the plea the court appears to have understood that the State’s recommendation of no jail was given against its wishes. The court noted,

“apparently what happened was that at the time the plea was taken, the State had said some things in addition to what was said in the statement in advance of plea. And those comments—and *maybe they were and maybe they weren’t intended as such*—but they did—it would indicate that they were not going to recommend, or they were going to recommend maybe affirmatively no jail time, which would include conditions of probation that would be jail time.” R. at 320, p. 8, lines 13–20; *emphasis added*.

Although whether the court did or did not follow the recommendations of the prosecutor is irrelevant to the question of whether the State performed its obligations to make certain recommendations, the court’s sentence of three months in jail, which exactly matches the State’s real recommendation before it was reluctantly withdraw, demonstrates the ineffective nature of the State’s attempt to withdraw its jail recommendation.

The court also stated, at the hearing on the motion to withdraw the plea, he relied on other recommendations. R. at 320, p. 12, lines 20-23. No other recommendations are in the record, unless the court was referring to UAP&P, which as explained above was bound by the State's promises.

If a party to a contract breaches that contract, the other party has a right to rescind the contract if the breach is material. Polyglycoat Corp. v. Holcomb, 591 P.2d 449 (Utah 1979). A material breach occurs when the failure of performance “defeats the very object of the contract or is of such prime importance that the contract would not have been made if default in that particular had been contemplated.” Id. at 451 (quoting Havas v. Alger, 461 P.2d 857 (Nev. 1969))

There can be no doubt that the desire not to be incarcerated is of prime importance to a defendant. The prosecutor noted, after seeing Mr. Smit's reaction to being sentenced to 90 days in jail as part of probation, “I think that he was quite surprised that the Court did go ahead and order some jail time.” R. at 320, p. 7, lines 13-14. The fact that Mr. Smit is still attempting to correct the problem raised by the State's breach, even after he served the time, testifies to the importance he placed on the State's recommendation of no jail.

The State's other promise, to dismiss one of the two counts of non-support cannot be said to be the prime importance, because Mr. Smit still agreed to pay restitution on

both counts. Additionally, the promise by the State to recommend a suspended sentence and probation is the first promise listed in the plea agreement. R. at 60.²

Because the State materially breached the plea agreement, Mr. Smit should have been allowed to withdraw his plea. The trial court's refusal to allow Mr. Smit to rescind the agreement must be reversed.

If this Court holds the State did technically comply with the agreement, the State still breached it by acting in bad faith. "As a general rule, every contract is subject to an implied covenant of good faith. Under the covenant of good faith and fair dealing, each party impliedly promises that he will not intentionally or purposely do anything which will destroy or injure the other party's right to receive the fruits of the contract. A violation of the covenant of good faith and fair dealing gives rise to a claim for breach of contract." Brown v. Moore, 973 P.2d 950, 954 (Utah 1998) (quoting Brehany v. Nordstrom, Inc., 812 P.2d 49, 55 (Utah 1991); St. Benedict's Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194, 200 (Utah 1991)).

"To comply with the covenant, a party must act consistently with the agreed common purpose and the justified expectations of the other party." Prince v. Bear River Mut. Ins. Co., 2002 UT 68, ¶27, 56 P.3d 524, 533 (Utah 2002) (quoting St. Benedict's Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194, 199, 200 (Utah 1991)). The purpose and expectations of the parties is determined by considering the contract language and the course of dealings between the parties. St. Benedict's Dev. Co., 811 P.2d at 200.

² Although the trial court held the promise to "recommend that any sentence imposed by suspended and that I be granted probation" (R. at 60) did not equate to a promise to recommend no jail, it will be shown in this brief that it did.

In *Prince*, the insurance company debated Prince's claim, which Prince argued was bad faith on the insurance company's part. *Prince*, 2002 UT at ¶¶3-5, 56 P.3d at 529. The *Prince* court reasoned if the insurance company had an arguable reason for denying Prince's claim, the insurance company would not be acting in bad faith. *Id.*, 2002 UT at ¶¶34, 56 P.3d at 535.

In this case, the State acted in bad faith when it recommended Mr. Smit serve three to six months in jail. The State did not have an arguable reason for doing so. The reason the prosecutor gave, with which the judge agreed (R. at 320, p. 12, lines 1-5), is that "nowhere in the plea agreement was there any mention of whether or not the State would or would not recommend a jail sentence" (R. at 320, p. 6, lines 2-4), and that there is a difference between suspending prison time and jail time (R. at 320, p. 7, lines 13-16).

Examining the agreement itself and the course of dealings between the parties, as directed by *St. Benedict's Dev. Co.*, reveals such an analysis of the agreement by the prosecutor is unreasonable. Mr. Smit had a justified expectation the State would at the least not recommend jail, if not affirmatively recommend no jail.

Looking first at the course of dealings between the parties, the prosecutor made no objection to Heineman's representation at the Change-of Plea hearing that the State was not seeking jail, even though the prosecutor did clarify another promise after Heineman had finished speaking. Moreover, after UAP&P recommended a three-month jail term, Heineman objected on the basis that such a recommendation violated the agreement. If the prosecutor had misgivings about the defendant's understanding of the agreement, and if she were acting in good faith, she would have at that time reviewed the record before

making her jail recommendation. The prosecutor, however, didn't review the record even after being told to do so by the court. R. at 318, p. 2, lines 9-23.

The most damaging evidence of the State's unreasonableness in recommending jail is the agreement itself. It reads, "the State will recommend that any sentence imposed be suspended and that I be granted probation," R. at 60. The word "any" alone is enough to encompass a possible jail sentence as well as a prison sentence, no matter what name is given to the jail sentence (in this instance the jail sentence is called "probation").

The words "suspended" and "sentence" refer to a jail sentence as well as prison sentence, both commonly and throughout the Utah Code. *See* U.C.A. §§77-18-8; 77-19-2; 77-19-3; 41-6-44(4),(5), and (6); 78-32-12.2(4)(c), (5)(a)(iv); 64-13c-101(3). Section 64-13c-101(3) of the Code, in particular, refers to a person who is convicted of a felony and is given probation in jail, as is the situation in this case. It identifies "jail" for such probationers as a "sentence." It reads, "'Inmate' means felony probationers **sentenced** to county jail under Subsection 77-18-1(8) [probation section]." Thus, to suspend any sentence would be to suspend a jail sentence under probation.

Furthermore, the word "sentence" must have referred to jail as a condition of probation since Mr. Smit did not qualify for prison time on the sentencing guidelines chart. R. at 65, p 12; R. at p. 6, lines 8-22. He was as far from the prison category as is possible.

To conclude or argue that for a defendant to ask that any sentence imposed be suspended means only to ask for a suspended prison sentence, while leaving open the

possibility of a jail sentence, violates the basic understanding of the words “any” and “sentence.”

As for the word “probation,” notwithstanding U.C.A. §77-18-1(8)(a)(v), which includes a term in jail as part of probation, and which section was never cited in the plea agreement or anywhere else in the record, “probation” is defined and understood commonly as, “the action of suspending the sentence of a convicted offender and giving him freedom during good behavior under the supervision of a probation officer.”

Webster’s Ninth New Collegiate Dictionary, p. 937 (Merriam-Webster, 1991). The legal dictionary also defines “probation” not as “the possibility of jail” but as, “Sentence imposed for commission of crime whereby a convicted criminal offender is released into the community under the supervision of a probation officer in lieu of incarceration.”

Black’s Law Dictionary (Sixth Edition), p. 1202 (West Publishing 1990). The definition continues, “It implies that defendant has a chance to prove himself and its purpose is reform and rehabilitation. For this purpose the defendant must agree to specified standards of conduct . . . ; however his violation of such standards subjects his liberty revocation. *Id.* at 1202.

The Utah Code may allow the court to use the term “probation” in a manner opposite its normal definition, but the Code does not give the prosecutor the right to use the term in that way when entering into agreements with defendants who may not understand all the special legal implications the Code attaches to it. To do so without divulging to the defendant that the prosecutor intends to seek jail time cannot be considered anything but bad faith.

Because the State materially breached its agreement with Mr. Smit, or because the State violated its duty of good faith by acting inconsistently with Mr. Smit's justified expectations, Mr. Smit must be allowed to rescind the plea agreement, consistent with contract law. The trial court's refusal to do so represents an abuse of its discretion.

2. The State violated Mr. Smit's constitutional rights.

Even if this Court decides Mr. Smit may not revoke his plea based on strict contract law, the State's violation of the plea agreement also violated Mr. Smit's rights to due process, for which he must be allowed to withdraw his plea. The Supreme Court of the United States has held, "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." Santobello v. New York, 404 US 257, 262, 30 L.Ed.2d 427, 433, 92 S.Ct. 495, 499 (1971).

In *Santobello*, the State of New York charged Santobello on two felony counts, to which he pled not guilty. *Id.*, 404 US at 258, 30 L.Ed.2d at 430, 92 S.Ct. at 497. After negotiations, the State agreed to allow Santobello to plead to a lesser-included offense, and promised not to make a sentence recommendation. *Id.*, 404 US at 258, 30 L.Ed.2d at 431, 92 S.Ct. at 497.

After several months of delay and a new prosecutor, the court held a sentencing hearing wherein the new prosecutor recommended the maximum sentence, citing Santobello's criminal record and alleged links with organized crime. *Id.*, 404 US at 259, 30 L.Ed.2d at 431, 92 S.Ct. at 497. Santobello objected that the prosecution had violated its agreement. *Id.*, 404 US at 259, 30 L.Ed.2d at 431, 92 S.Ct. at 497. The sentencing

judge ended the discussion by quoting extensively from the pre-sentence report saying he was not at all influenced by the prosecutor's recommendation, but decided on the sentence on his own, sentencing him to the maximum sentence. *Id.*, 404 US at 259, 30 L.Ed.2d at 431, 92 S.Ct. at 497.

The New York appellate court affirmed the trial court's decision, and Santobello appealed to the United States Supreme Court. *Id.*, 404 US at 260, 30 L.Ed.2d at 432, 92 S.Ct. at 498. The Supreme Court reversed and remanded with instructions to allow Santobello to be sentenced by a different judge with proper recommendations, or to allow Santobello to withdraw his plea. *Id.*, 404 US at 263, 30 L.Ed.2d at 433, 92 S.Ct. at 499.

The Court reasoned the promise to not recommend incarceration was material to the agreement and had been made based on the consideration of Santobello giving up important constitutional rights. *Id.*, 404 US at 262, 30 L.Ed.2d at 433, 92 S.Ct. at 499. The fact that the judge was not influenced by the prosecutor's recommendation was irrelevant, since the issue pertained only to whether the prosecution upheld its end of the bargain. *Id.*, 404 US at 260, 30 L.Ed.2d at 432, 92 S.Ct. at 498.

In this case, as in the *Santobello* case, the defendant Smit pled not guilty to two felony counts. R. at 46. Also in this case as in the *Santobello* case, the State agreed to allow Mr. Smit to change his plea to guilty to something less than the two felony counts, and promised not to recommend jail. R. at 55; R. at 318, p. 3, lines 6-11. And in this case as in *Santobello*, after a couple of months of delay, the prosecutor recommended a jail sentence contrary to the agreement, and in the process explained why the defendant should receive jail (in this case the prosecutor said it would help Smit think about what he

has done and give him a wake up call). R. at 319, p. 14 line 24 – p. 15, line 13. Further, similar to *Santobello*, Mr. Smit objected that the prosecution had violated its agreement, but the sentencing judge explained the record had been corrected, and he, the judge, had not at all been influenced by the prosecutor's jail recommendation. R. at 320, p. 12, lines 14-23. Finally, as in *Santobello*, Mr. Smit received the exact sentence that had been recommended by the prosecutor. R. at 318, p. 9, lines 16-18..

The only real difference between the cases is that after the recommendations from the prosecutor and UAP&P in this case, the prosecutor stated she was prepared to withdraw the recommendation. But the language of the *Santobello* Court's decision about the irrelevancy of whether the judge says he was influenced by the wrong recommendation, and the instruction that another judge should do the sentencing (if the state court decided to enforce the plea agreement), makes it clear that once the prosecutor has poisoned the court with a recommendation in violation of a plea agreement, simply allowing the same judge to sentence the defendant or explain that the violating recommendation had no influence over him, disturbs the interests of justice.

The Court also mentioned that a plea is not voluntary, even if the defendant says it is, if the prosecutor promises something but does not disclose the essence of that promise. Id., 404 US at 261, 30 L.Ed.2d at 432, 92 S.Ct. at 498.

Justice Douglas remarked in his concurring opinion that because of the important constitutional rights being given up, including the right to trial by jury, to confront one's accusers, to present witnesses in one's defense, to remain silent, and to be convicted by proof beyond reasonable doubt, guilty pleas obtained unfairly or through ignorance

should be vacated. Id., 404 US at 264, 30 L.Ed.2d at 434, 92 S.Ct. at 500. Justice Douglas also declared whether the defendant should be sentenced before another judge or be allowed to withdraw his plea should be decided with great deference to the wishes of the defendant, inasmuch as the defendant was the wronged party. Id., 404 US at 267, 30 L.Ed.2d at 436, 92 S.Ct. at 501. Justice Marshall went further, saying, “When a prosecutor breaks the bargain, he undercuts the basis for the waiver of constitutional rights implicit in the plea. This it seems to me provides the defendant ample justification for rescinding the plea.” Id., 404 US at 268, 30 L.Ed.2d at 436, 92 S.Ct. at 502.

Considering the foregoing, there can be no doubt that to refuse Mr. Smit some relief was an abuse of discretion. If Mr. Smit is not allowed to withdraw his plea and proceed to trial, he should at the minimum be allowed to be sentenced by another judge, having the prosecution make the appropriate recommendation that he not serve any sentence, be it prison or jail.

II. THE COURT FAILED TO COMPLY WITH RULE 11

The second reason Mr. Smit must be allowed to withdraw his plea is the trial court’s failure to strictly comply with Rule 11, Utah Rules of Criminal Procedure. Because the issue was not preserved at the trial court, Mr. Smit must establish plain error by the court, demonstrating (1) that an error exists, (2) the error should have been obvious, and (3) the error is harmful. State v. Dunn, 850 P.2d 1201, 1208 (Utah 1993); State v. Ostler, 2000 Utah Ct. App. 028, ¶8, 996 P.2d 1065, 1068 (Utah App. 2000); State v. Tarnawiecki, 2000 Utah Ct. App. 186, ¶11, 5 P.3d 1222, 1226 (Utah App. 2000).

A court's failure to strictly, rather than substantially, comply with Rule 11(e)(5) gives a defendant good cause to withdraw his guilty plea because he entered the plea unknowingly and involuntarily, and a court that refuses to allow a plea withdrawal after such failure commits error. Ostler, 2000 Utah Ct. App. at ¶15, 996 P.2d at 1070; Tarnawiecki, 2000 Utah Ct. App. at ¶12, 5 P.3d at 1226; State v. Smith, 812 P.2d 470, 476 (Utah App. 1991).

In *Ostler*, the court failed to explain, among other things, the possible punishments for the charged crime. Ostler, 2000 Utah Ct. App. at ¶15, 996 P.2d at 1070. This error by the court gave Ostler good cause to withdraw his guilty plea. Id., at 2000 Utah Ct. App. at ¶15, 996 P.2d at 1070 . Such an error should have been obvious to the court, which allowed Ostler to argue the issue even though it was not properly preserved. Id., 2000 Utah Ct. App. at ¶27, 996 P.2d at 1072.


In this case, the trial court did explain the maximum prison term of five years, but failed to explain the maximum term of one year in jail if sentenced to probation. It was particularly plain error in this case because Mr. Smit's criminal history put him in the very corner of the probation area, as far from prison time as he could get. Additionally, the State had promised to recommend probation. Finally, and perhaps most importantly, the court itself recognized the very real possibility of jail time as part of probation, stating, "a recommendation to suspend the jail sentence, or to suspend the sentence can only be interpreted to mean to suspend the prison sentence, not to send the defendant to prison. It does not deal with the conditions of probation. This jail sentence that I've imposed is a condition of probation." R. at 320, p. 12, lines 1-7.

Because Mr. Smit did not understand the maximum sentence of one year in jail for probation, he unknowingly and involuntarily entered his guilty plea to his detriment. In accordance with strict-compliance nature of the Rule 11(e), Mr. Smit must be allowed to withdraw his plea. Failure by the trial court to allow the plea withdrawal was plain error outside the court's discretion.

CONCLUSION

Based on the foregoing, this Court must find the trial court abused its discretion in refusing to allow Mr. Smit to withdraw his guilty plea. The case should be remanded so Mr. Smit may re-plead to the charges against him and exercise his constitutional right to a trial if he should so wish.

DATED this 8th day of September, 2003


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MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing Appellant's Brief was mailed first-class, postage prepaid to:

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this 8th day of September, 2003.

