

2002

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

vs.

**JEFFREY RANDAL SMIT, aka
JEFFREY RANDALL CATES**

Defendant/Appellant.

Case No. 20020505-CA

BRIEF OF APPELLEE

**APPEAL FROM A DENIAL OF A MOTION TO WITHDRAW A GUILTY
PLEA TO ONE COUNT OF CRIMINAL NONSUPPORT, A THIRD
DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-7-201
(Supp. 1999), IN THE THIRD JUDICIAL DISTRICT COURT, SALT
LAKE COUNTY, THE HONORABLE JOSEPH C. FRATTO PRESIDING**

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Case No. 20020505-CA

BRIEF OF APPELLEE

* * *

JURISDICTION AND NATURE OF PROCEEDINGS

Defendant appeals from the denial of his motion to withdraw his guilty plea to one count of criminal nonsupport, a third degree felony, in violation of Utah Code Ann. § 76-7-201 (Supp. 1999). This court has jurisdiction pursuant to Utah Code Ann. 78-2a-3(2)(e) (2002).

ISSUES PRESENTED ON APPEAL AND STANDARDS OF REVIEW

1. Does defendant show good cause to withdraw his plea, where the prosecutor recommended, in contravention of the plea agreement, that defendant serve 90 days in jail, but then promptly withdrew that recommendation and recommended no jail time?

This issue arises from the district court's denial of defendant's motion to withdraw his guilty plea. Whether a court properly denied a motion to withdraw a guilty plea is reviewed for abuse of discretion. *See State v. Norris*, 2002 UT App 305, ¶ 6, 57 P.3d 238.

2. May this Court review defendant's unpreserved rule 11 claim where he asserts plain error, not in the denial of his motion to withdraw his plea, but in the plea hearing?

This issue does not require the Court to review a ruling or failure to rule by the district court; thus no standard of review applies.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Utah R. Crim. P. 11 is attached as **Addendum A**.

STATEMENT OF THE CASE AND FACTS

Defendant is the father of Kelly Alesha Beesley, born September 2, 1988, and Cody Sheffield, born July 18, 1991 (R. 5-14; 317:8). He is under court order to pay child support for each of them (R. 7-8, 56). By June 4, 2002, defendant owed \$53,798.36 in back child support and interest for Kelly and \$10,398.45 in back child support for Cody (R. 318:5-6).

On September 7, 2001, the State charged defendant with two counts of criminal nonsupport (R. 5-14). After lengthy plea negotiations, defendant and the State reached a plea agreement (R. 55-61; 317:2). Defendant pled guilty to one count of criminal nonsupport, but agreed to pay restitution for both counts (R. 60; 317:3, 7). The State agreed to dismiss count two and "to recommend that any sentence imposed be suspended and that [defendant] be granted probation" (R. 60).

Defendant signed a Statement of Defendant in Support of Guilty Plea which recited the terms of the agreement (R. 55-61). In that statement, defendant acknowledged that by pleading guilty he would waive his right to a speedy public trial by an impartial jury, to

confront and cross-examine witnesses, to compel the attendance of witnesses, to choose whether or not to testify, to be presumed innocent, and to require the State to satisfy its burden of proof beyond reasonable doubt (R. 57-58). He also acknowledged that his right to appeal would be limited, that he understood the minimum and maximum sentences that the judge could impose, and that the judge was not bound by any sentencing recommendations from the parties (R. 58-60).

At the plea hearing, the court reviewed the elements of criminal nonsupport with defendant (R. 317:2-3). It also reviewed the constitutional rights that defendant would waive by pleading guilty (R. 317:5). The court then asked the parties if there were any additional terms to the plea agreement (R. 317:6). Defense counsel recited the terms of the agreement including that “the State is not seeking any jail time in sentencing in this matter” (R. 317:6). The court then solicited a factual basis for the plea from the prosecutor (R. 317:8). The court expressly found that the plea was knowing and voluntary based on the colloquy and defendant’s acknowledgement that he had read and understood his written statement (R. 317:9). The court then executed a written order in which it accepted and entered the plea, again finding that the plea was freely and voluntarily made (R. 64).

Before sentencing, Adult Probation and Parole (AP&P) prepared a Presentence Investigation Report (PSI) (R.65). In that report, AP&P recommended that “defendant serve three months in jail” (R. 65).

At the sentencing hearing, defense counsel proposed several corrections to the PSI (R. 319:3-6). He then said,

And the only other correction, I suppose it's more of an addition. As part of the plea the State did agree to recommend no jail as a part of the pre-sentence here and so that should be in addition. I suppose it doesn't need to be made to the report but it needs to be considered by the court as well.

(R. 319:6-7). Later in the hearing, the State addressed defense counsel's claim that the State agreed not to recommend jail:

As far as the State's recommendation for no jail. Your Honor, this case has been ongoing for some time and it went through several plea negotiations and at one time we were considering a plea in abeyance. Mr. Smit has indicated that he is expecting a settlement offer and he was going to be paying off a lump sum amount. That never materialized. I've gone through my notes and also the statement in advance of plea and all that I recall recommending is that there would be a recommendation for probation. There may have been a recommendation for no jail when we were discussing the lump sum payment and the plea in abeyance offer.

(R. 319:13-14). The State then recommended that, as part of probation, defendant serve "a minimum of three months, if not six months in jail" (R. 319:14). Because of the dispute about the agreement, the court then recessed so that the parties could review the tape from the change of plea hearing and determine exactly what the State had agreed to recommend (R. 319:16-17).

When the court reconvened, the parties stipulated that the State had agreed to recommend that the court not impose a jail sentence (R. 318:3). Accordingly, the State withdrew its recommendation that defendant serve jail time (R. 318:3). The court then sentenced defendant to a suspended prison term of zero-to-five years (R. 75; 318:7-8). It also placed defendant on probation, but imposed a ninety-day jail sentence as a condition of

probation (R. 76; 318:9). The court signed and filed the minutes for sentencing, judgment, and commitment on June 6, 2002 (R. 75-77).

Less than two weeks later, on June 18, 2002, defendant filed a timely motion to withdraw his guilty plea (R. 82-90). Defendant claimed that the State “failed to perform its end of the plea agreement” (R. 82). Defendant asserted that the State never recommended a suspended sentence and that both the prosecutor and AP&P recommended a jail sentence (R. 89). Defendant also claimed that the State’s withdrawal of its recommendation of jail “was nothing more than a frivolous, transparent attempt to give the appearance of abiding with the terms of the plea agreement” and that “[t]he [c]ourt knew what [the State’s] real recommendation was” (R. 87). Defendant did not assert any other ground for withdrawing his guilty plea (R. 82-90)

On June 21, 2002, the court held a hearing on defendant’s motion (R. 122; 320:10). It found, based on the statement in support of the plea and verbal representations at the plea hearing, that the State had agreed not to recommend jail as a condition of probation (R. 320:12). But, the court also found that the State properly and timely withdrew its recommendation of jail time (R. 320:11). The court said, “I imposed the sentence under the impression that the State’s recommendation was that I should not send [defendant] to jail—or to prison and I should not impose, as a condition of probation any jail sentence” (R. 320:12). The court continued, “I had other recommendations. I considered all those recommendations and came to my con—came to my judgment, that 90 days was an

appropriate period of time as a condition of probation” (R. 320:12). The court orally denied defendant’s motion, but never entered a signed order (R. 122; 320:10)

That same day, defendant filed a pro se notice of appeal (R. 123). After defendant filed his opening brief, the parties realized that the district court never entered a final order denying defendant’s motion to withdraw his plea. Defendant notified the district court of this omission and the court filed a signed order denying the motion on December 12, 2003. *See* Order on Motion to Withdraw Plea, attached as **Addendum B**. Defendant then filed an amended notice of appeal. *See* Amended Notice of Appeal, attached as **Addendum C**.

SUMMARY OF ARGUMENT

POINT I. Defendant received the benefit of his plea agreement. Although the prosecutor initially recommended jail time, she promptly withdrew that recommendation when reminded of her agreement. The trial court later acknowledged that it sentenced defendant with the understanding that the State recommended that defendant not serve jail time. Adult Probation and Parole’s (AP&P) recommendation of jail time did not breach the plea agreement because AP&P was not a party to the plea agreement and was thus not bound by its terms.

POINT II. A defendant appealing from the denial of his motion to withdraw a guilty plea cannot appeal plain errors allegedly committed in the plea hearing, only those committed in the motion hearing. For an appellate court to directly review the plea hearing would violate the prohibition against direct review of guilty pleas. Cases to the contrary are wrongly decided, and the issue is pending before the Utah Supreme Court.

In the alternative, defendant's rule 11 claim is meritless. Rule 11 requires only that the court inform defendant of the minimum and maximum sentence it may impose. Criminal nonsupport carries a possible maximum prison term of zero to five years. The option to sentence defendant to one year in jail as part of his probation is neither the minimum nor the maximum, but is an intermediate sentence. Thus the court did not err in not telling defendant about the possibility of jail time as part of his probation.

ARGUMENT

I. THE PROSECUTOR DID NOT BREACH THE PLEA AGREEMENT BECAUSE SHE PROMPTLY WITHDREW THE INCORRECT RECOMMENDATION; MOREOVER, EVEN IF THE PROSECUTOR DID BREACH, THE PROPER REMEDY IS SPECIFIC PERFORMANCE, NOT WITHDRAWAL OF THE PLEA

Defendant asserts that the State breached the plea agreement and that he should therefore be permitted to withdraw his guilty plea. Aplt. Br. at 19. Specifically, he claims that the State agreed during plea negotiations not to recommend jail time and that the State breached that agreement when both the prosecutor and Adult Probation and Parole recommended that defendant serve time in jail as a condition of probation. Aplt. Br. at 8-19. The State concedes that the plea agreement required the prosecutor not to recommend jail time. Defendant's claim nevertheless fails because the prosecutor promptly corrected her initial recommendation, thereby curing any error.

A. By withdrawing her recommendation of jail time, the prosecutor complied with the plea agreement.

"It is well established that a prosecutor may not make promises which induce a guilty plea and then refuse to keep those promises." *State v. Copeland*, 765 P.2d 1266, 1275 (Utah

1988); *see also Santobello v. New York*, 404 U.S. 257, 262 (1971). A plea agreement binds the prosecutor and the defendant to its terms, much like a contract. *See State v. Patience*, 944 P.2d 381, 386 (Utah App. 1997) (noting that many courts treat plea agreements like contracts).

In the present case, defendant received what he bargained for: a recommendation from the prosecutor that he not serve any jail time. While the prosecutor initially recommended jail time, after the recess in which the parties had an opportunity to review the record, the prosecutor replaced that recommendation with one of no jail time (R. 319:14; 318:3). The prosecutor stated, “Your Honor, the State is prepared to withdraw its recommendation of—affirmative recommendation for jail” (R. 318:3). The court replied, “All right. Apparently the—the recommendation that was part of the agreement was that it was to impose no jail sentence” (R. 318:3). The prosecutor affirmed, “Correct” (R. 318:3). Later, at the motion to withdraw hearing, the court reaffirmed that it understood the State’s recommendation to be no jail time: “I imposed the sentence under the impression that the State’s recommendation was that I should not send Mr. Smit to jail—or to prison and I should not impose, as a condition of probation any jail sentence” (R. 320:12).

Defendant claims that the State’s withdrawal of its recommendation of jail was “insufficient to erase in the court’s consciousness the State’s real recommendation.” Aplt. Br. at 13. Defendant’s assertion is unsupported by the record. He assumes that the State’s initial erroneous recommendation tainted the court merely because the court eventually imposed a sentence including jail time. The court, however, expressly declared that it

sentenced defendant with the understanding that the State recommended against jail time (R. 320:12). In addition, as explained in the next section, AP&P's recommendation of jail time was properly before the court, and it appears that the court may have relied on that recommendation in making its decision. Finally, the statement in support of defendant's plea acknowledged and the court explained to defendant that the court was not bound by any sentencing recommendations (R. 60; 317:6). "A trial judge exercises broad discretion in the imposition of sentence." *State v. McKenna*, 728 P.2d 984, 986 (Utah 1986). Defendant's claim that the judge was "tainted" by the prosecutor's initial erroneous recommendation is thus purely speculative.

Defendant also asserts that the instant case is indistinguishable from *Santobello v. New York*, 404 U.S. 257 (1971). *Aplt. Br.* at 19-21. Rudolph Santobello pled guilty to two gambling related offenses. *Santobello*, 404 U.S. at 258. As part of the plea agreement, the prosecutor agreed not to make a sentencing recommendation. At the sentencing hearing, however, a new prosecutor who was unaware of the terms of the plea agreement appeared and recommended that the court impose the maximum sentence. *Id.* Defense counsel immediately objected and asked for an adjournment. *Id.* A dispute as to the terms of the plea agreement ensued. *Id.* at 259. The court ended the discussion by saying, "[Defense Counsel], I am not at all influenced by what the district Attorney says, so that there is no need to adjourn the sentence, and there is no need to have any testimony." *Id.* The court stated that, given Santobello's long criminal history, it intended to impose the maximum sentence irrespective of any recommendations *Id.* On appeal, the U.S. Supreme Court held

that the prosecutor had breached the plea agreement and remanded the case to state court for a determination of the appropriate remedy. *Id.* at 262.

In the instant case, as in *Santobello*, the prosecutor recommended, in contravention of the plea agreement, that defendant serve jail time (R. 319:14). Unlike *Santobello*, however, the court below ordered a recess to allow the parties to consult the record (R. 319:16-17). When the parties returned, the State withdrew its recommendation, and the court confirmed with the State that its actual recommendation was that defendant serve no jail time (R. 318:3). Thus, unlike *Santobello*, defendant received the benefit of his bargain because the State corrected itself (R. 318:3). Moreover, the court later acknowledged that it sentenced defendant with the understanding that the State recommended that he not serve jail time (R. 320:12).

B. Adult Probation and Parole was not a party to the plea agreement and thus was not bound by its terms.

Defendant claims that Adult Probation and Parole (AP&P) “is undoubtedly an agency of the State of Utah and was bound by the agreement” not to recommend jail time. Aplt. Br. at 12.

AP&P was not a party to the plea agreement. No one from AP&P was present during plea negotiations or at the change of plea hearing. AP&P did not sign or approve the plea agreement (R. 55-64). The only parties to the agreement were the prosecutor, defendant, and the court who accepted defendant’s plea (R. 61-64). AP&P is, in fact, a separate governmental entity under the Department of Corrections which is controlled by the governor, not the Attorney General, who prosecuted defendant, or the district attorneys, who

prosecute most criminals in Utah. *See* Utah Code Ann. § 64-13-2 (2000). AP&P is authorized by the legislature to make sentencing recommendations. *See* Utah Code Ann § 64-13-20(2) (2000) (“The [Department of Corrections] may provide recommendations concerning appropriate measures to be taken regarding offenders.”). That authority cannot be confined or revoked by a plea agreement to which AP&P was not a party.

Therefore, AP&P’s recommendation did not constitute a breach of the *prosecutor’s* agreement.

C. If the State breached the agreement, the proper remedy is a new sentencing hearing, not withdrawal of the plea.

Defendant claims that the State’s alleged breach of the plea agreement warrants withdrawal of his plea. Br. Aplt. at 7, 24. In the event that this Court determines that the State did breach its plea agreement, the appropriate remedy is resentencing, not withdrawal of the plea.

“[T]he remedy for a defendant where the State fails to fulfill its side of the bargain is frequently specific performance.” *State v. West*, 765 P.2d 891, 896 (Utah 1988); *see also*, *State v. Garfield*, 552 P.2d 129, 131 (Utah 1976) (holding that if prosecutor failed to recommend probation as agreed, defendant is entitled to resentencing with agreed recommendation from prosecutor). If the defendant is misled as to the terms of the agreement or their value, however, his plea was involuntary and the proper remedy is withdrawal of the plea. *See State v. Copeland*, 765 P.2d 1266, 1275-76 (Utah 1988) (allowing withdrawal where prosecution promised to recommend hospitalization, but court had no discretion to grant or deny hospitalization); *State v. Bero*, 645 P.2d 44, 46-47 (Utah

1982) (holding withdrawal appropriate where no meeting of the minds occurred between prosecutor and defendant as to terms of plea agreement); *State v. Norris*, 2002 UT App 305, ¶¶ 12-13, 57 P.3d 238 (allowing defendant to withdraw plea where court and prosecution incorrectly told defendant he could pursue a vindictive prosecution claim on appeal).

Defendant's claim that the State breached the agreement does not warrant withdrawal of the plea. Defendant does not claim that the alleged breach caused him to plead guilty involuntarily. He only claims that the breach deprived him of the benefit of his voluntary plea. Thus, if the State breached the agreement, the proper remedy is re-sentencing with a new judge, not withdrawal of defendant's guilty plea. *See Garfield*, 552 P.2d at 131.

II. DEFENDANT'S RULE 11 CLAIM FAILS BECAUSE HE ASSERTS PLAIN ERROR IN THE PLEA TAKING, NOT IN THE DISTRICT COURT'S DENIAL OF HIS MOTION TO WITHDRAW, WHICH IS THE ONLY ORDER FROM WHICH HE HAS A RIGHT TO APPEAL

Defendant's rule 11 claim should be dismissed because he asserts error in a hearing from which he has no right of appeal. When a defendant appeals from the denial of his motion to withdraw his guilty plea, the appellate court has jurisdiction to correct plain errors committed in the motion hearing, but not plain errors committed in the plea hearing, from which defendant has no right of appeal.

A. This Court may not review errors in the plea hearing for plain error.

Utah law does not permit a defendant to directly attack a guilty plea on appeal. For over a decade, Utah procedure has required a defendant to file a motion to withdraw as a predicate to direct appellate review of the validity of a guilty plea. *See State v. Reyes*, 2002 UT 13, ¶ 3, 40 P.3d 630; *State v. Gibbons*, 740 P.2d 1309, 1311-12 (Utah 1987); *Summers v.*

Cook, 759 P.2d 341, 343-45 (Utah App. 1988). This is so because the appellate court lacks jurisdiction to directly review the plea hearing, even for plain errors. *Reyes*, 2002 UT 13, ¶¶ 4, 5. Defendant must first file a timely motion to withdraw his plea. *Id.* at ¶ 4. He may then appeal the order denying that motion.

This arrangement is similar to the appeal of bindover. An appellate court may not entertain an appeal from a magistrate's bindover order. *State v. Humphrey*, 823 P.2d 464, 467 (Utah 1991). The defendant must first move to quash the bindover in the district court (which may in fact be presided over by the same "magistrate" who bound him over). Then appeal from the denial of his motion to quash. *Id.* at 468 n.9.

In *State v. Reyes*, Reyes sought to circumvent these requirements. After pleading guilty, he filed a rule 22(e) motion to correct an allegedly illegal sentence; the district court denied his motion and Reyes appealed. *Reyes*, 2002 UT 13, ¶ 1. On appeal, the supreme court noted, Reyes "has not addressed the court's denial of his motion . . ." *Id.* at ¶ 2. Rather, he claimed plain error in the taking of his plea. *Id.* ¶¶ 2, 3. In effect, he attempted to use his rule 22(e) motion as a Trojan horse to admit him to the appellate forum, where he sought direct plain error review of his plea hearing. His attempt failed, however, as the supreme court dismissed his appeal for lack of jurisdiction. *Id.* ¶ 5.

Defendant's approach here is not materially different. He does not assert plain error in the denial of his motion to withdraw, which is the only order from which he has a right of appeal, but seeks direct plain error review of the plea bearing. For this Court to directly review the plea hearing, even for plea error, would be to grant defendant precisely what

Reyes and the cases upon which it relies forbid: direct review of the plea hearing. Plain error review is available in plea withdrawal cases, but it is limited to review of plain errors committed in connection with a district court's denial of the motion to withdraw.

Accordingly, this Court should dismiss defendant's rule 11 claim for lack of jurisdiction.¹

B. Even if this Court concludes defendant's rule 11 claims are properly before it, this Court should reject them because no error was committed.

Defendant claims that the trial court violated rule 11(e)(5), Utah Rules of Criminal Procedure, attached as **Addendum A**, when it failed to "explain the maximum term of one year in jail if sentenced to probation." *Aplt. Br.* at 23. This claim is without merit.

"The purpose of rule 11 is to ensure that a defendant knows of his or her rights and thereby understands the consequences of a decision to plead guilty." *State v. Mora*, 2003 UT App 117, ¶ 18, 69 P.3d 838 (quoting *State v. Martinez*, 2001 UT 12, ¶ 22, 26 P.3d 203). Rule 11(e)(5) requires the court to ensure that "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."

In the present case, defendant signed a statement in support of the plea that informed him that crime of criminal nonsupport carried a possible prison sentence of zero-to-five years

¹ The State recognizes that this Court has engaged in plain error review of plea hearings, but the practice is currently being challenged on certiorari review. *See, e.g. State v. Dean*, 2002 UT App 323, 57 P.3d 1106, *cert. granted* 64 P.3d 586 (Utah 2003).

Addenda

Addendum A

Rule 11. Pleas.

(a) Upon arraignment, except for an infraction, a defendant shall be represented by counsel, unless the defendant waives counsel in open court. The defendant shall not be required to plead until the defendant has had a reasonable time to confer with counsel.

(b) A defendant may plead not guilty, guilty, no contest, not guilty by reason of insanity, or guilty and mentally ill. A defendant may plead in the alternative not guilty or not guilty by reason of insanity. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(c) A defendant may plead no contest only with the consent of the court.

(d) When a defendant enters a plea of not guilty, the case shall forthwith be set for trial. A defendant unable to make bail shall be given a preference for an early trial. In cases other than felonies the court shall advise the defendant, or counsel, of the requirements for making a written demand for a jury trial.

(e) 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:

(1) if the defendant is not represented by counsel, he or she has knowingly waived the right to counsel and does not desire counsel;

(2) the plea is voluntarily made;

(3) the defendant knows of the right to the presumption of innocence, the right against compulsory self-incrimination, the right to a speedy public trial before an impartial jury, the right to confront and cross-examine in open court the prosecution witnesses, the right to compel the attendance of defense witnesses, and that by entering the plea, these rights are waived;

(4)(A) the defendant understands the nature and elements of the offense to which the plea is entered, that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt, and that the plea is an admission of all those elements;

(B) there is a factual basis for the plea. A factual basis is sufficient if it establishes that the charged crime was actually committed by the defendant or, if the defendant refuses or is otherwise unable to admit culpability, that the prosecution has sufficient evidence to establish a substantial risk of conviction;

(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;

(6) if the tendered plea is a result of a prior plea discussion and plea agreement, and if so, what agreement has been reached;

(7) the defendant has been advised of the time limits for filing any motion to withdraw the plea; and

(8) the defendant has been advised that the right of appeal is limited.

These findings may be based on questioning of the defendant on the record or, if used, a sworn statement reciting these factors after the court has established that the defendant has read, understood, and acknowledged the contents of the sworn statement. If the defendant cannot understand the English language, it will be sufficient that the sworn statement has been read or translated to the defendant.

Unless specifically required by statute or rule, a court is not required to inquire into or advise concerning any collateral consequences of a plea.

(f) Failure to advise the defendant of the time limits for filing any motion to withdraw a plea of guilty, no contest or guilty and mentally ill is not a ground for setting the plea aside, but may be the ground for extending the time to make a motion under Section 77-13-6.

(g)(1) If it appears that the prosecuting attorney or any other party has agreed to request or recommend the acceptance of a plea to a lesser included offense, or the dismissal of other charges, the agreement shall be approved by the court.

(2) If sentencing recommendations are allowed by the court, the court shall advise the defendant personally that any recommendation as to sentence is not binding on the court.

(h)(1) The judge shall not participate in plea discussions prior to any plea agreement being made by the prosecuting attorney.

(2) When a tentative plea agreement has been reached, the judge, upon request of the parties, may permit the disclosure of the tentative agreement and the reasons for it, in advance of the time for tender of the plea. The judge may then indicate to the prosecuting attorney and defense counsel whether the proposed disposition will be approved.

(3) If the judge then decides that final disposition should not be in conformity with the plea agreement, the judge shall advise the defendant and then call upon the defendant to either affirm or withdraw the plea.

(i) With approval of the court and the consent of the prosecution, a defendant may enter a conditional plea of guilty, guilty and mentally ill, or no contest, reserving in the record the right, on appeal from the judgment, to a review of the adverse determination of any specified pre-trial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

(j) When a defendant tenders a plea of guilty and mentally ill, in addition to the other requirements of this rule, the court shall hold a hearing within a reasonable time to determine if the defendant is mentally ill in accordance with Utah Code Ann. § 77-16a-103.

(Amended effective May 1, 1993; January 1, 1996; November 1, 1997; November 1, 2001.)

Addendum B

FILED DISTRICT COURT
Third Judicial District

DEC 13 2003

SALT LAKE COUNTY

By _____ Deputy Clerk

Preston S. Howell, #8547
Attorney for Jeffrey Randall Smit
3386 Ramsey Circle
Salt Lake City, Utah 84120
Telephone: (801) 840-9831

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

STATE OF UTAH,

Plaintiff,

vs.

JEFFREY RANDALL SMIT
AKA JEFFREY RANDALL CATE,
Defendant,

ORDER ON MOTION TO WITHDRAW
PLEA

Case No. 011200900

Judge Michael K. Burton

Pursuant to Defendant Jeffrey Randall Smit's Motion to Withdraw Plea, this

Court held a hearing before the Honorable Joseph C. Fratto, Jr. on June 21, 2002.

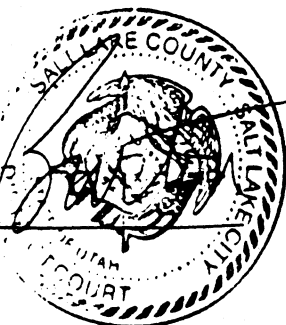
Defendant was present and represented by Preston S. Howell. Plaintiff was represented by Janise K. Macanas. Having heard oral arguments and having reviewed the record in this matter,

IT IS HEREBY ORDERED that Defendant's Motion to Withdraw Plea is denied for failure to show good cause.

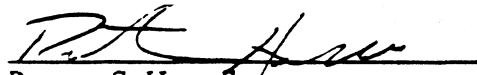

DATED this 17 day of Dec, 2003

BY THE COURT

Michael K. Burton
Judge Michael K. Burton



Approved as to form:


Preston S. Howell
Attorney for Jeffrey Randall Smit
Matthew D. Bates
Attorney for State of Utah

Addendum C

Preston S. Howell, #8547
Attorney for Jeffrey Randall Smit
3386 Ramsey Circle
Salt Lake City, Utah 84120
Telephone: (801) 840-9831

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

STATE OF UTAH,

Plaintiff,

vs.

JEFFREY RANDALL SMIT
AKA JEFFREY RANDALL CATE,
Defendant,

AMENDED NOTICE OF APPEAL


Case No. 011200900

Judge Michael K. Burton

Notice is hereby given that Defendant and Appellant, Jeffrey Randall Smit,
through counsel, Preston S. Howell, amends his appeal to the Utah Court of Appeals,
appealing the final order of the Honorable Michael K. Burton entered in this matter on
December 12, 2003.

The appeal is taken from the entire judgment.

DATED this 12th day of December 2003



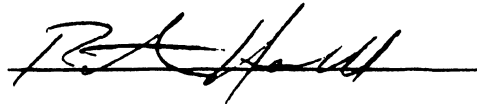
Preston S. Howell
Attorney for Jeffrey Randall Smit

DELIVERY CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Amended Notice of Appeal was hand-delivered to the prosecuting attorney at the following address:

Matthew D. Bates
160 East 300 South, Sixth floor
Salt Lake City, UT 84114

this 11th day of December 2003.

A handwritten signature in black ink, appearing to read "R. A. Hall", written over a horizontal line.

(R. 56). In addition, at the change of plea hearing, the court told defendant, "And what the law permits me to do in this case is to send you to the Utah State Prison for up to five years . . ." (R. 317:5). Defendant was thus informed before the court accepted his plea of the minimum possible sentence—no prison or jail time—and the maximum sentence—five years.

Defendant nevertheless complains that he was unaware that the court could impose an intermediate sentence of up to a year in jail as a condition of probation. Such an omission does not violate rule 11 or render the plea involuntary. The rule requires only that defendant be informed of the minimum and maximum sentences that he faces. Utah R. Crim. P. 11. It does not require the court to inform defendant of every possible sentence in between.

Defendant's claim fails.

CONCLUSION

For the foregoing reasons, the State respectfully requests the Court to affirm defendant's conviction and sentence and the trial court's denial of defendant's motion to withdraw his plea.

Respectfully submitted this 15th day of December 2003.

MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL

A handwritten signature in black ink, appearing to read "Matthew D. Bates", written over a horizontal line.

MATTHEW D. BATES
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of December 2003 I served two copies of the foregoing Brief of Appellee upon the defendant/appellant, Jeffrey Randall Smit, by causing them to be delivered by first class mail to Preston S. Howell, his counsel of record, at 3386 Ramsey Circle, Salt Lake City Utah, Utah 84120.

A handwritten signature in black ink, appearing to read "Matthew D. Bates", is written over a horizontal line.

Matthew D. Bates
Assistant Attorney General