

2002

# Utah v. Kent Kyle Stringham : Petition for Rehearing

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca2](https://digitalcommons.law.byu.edu/byu_ca2)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Julie George; Attorney for Appellant.

Marian Decker; Assistant Attorney General; Mark L. Shurtleff; Attorney General; David K. Cunningham; Deputy Duchesne County Attorney; Attorneys for Appellee.

---

## Recommended Citation

Legal Brief, *Utah v. Kent Kyle Stringham*, No. 20020591 (Utah Court of Appeals, 2002).  
[https://digitalcommons.law.byu.edu/byu\\_ca2/3893](https://digitalcommons.law.byu.edu/byu_ca2/3893)

This Legal Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

IN THE UTAH COURT OF APPEALS

---

STATE OF UTAH,

:

Plaintiff/Appellee,

:

v.

:

KENT KYLE STRINGHAM

:

Case No. 20020591-CA

Defendant/Appellant.

:

---

PETITION FOR REHEARING

-----

**JULIE GEORGE**  
32 Exchange Place, Suite 101  
Salt Lake City, Utah 84111

Attorney for Appellant

**MARIAN DECKER (5688)**  
Assistant Attorney General  
**MARK L. SHURTLEFF (4666)**  
Utah Attorney General  
160 East 300 South, 6<sup>th</sup> Floor  
Salt Lake City, Utah 84114-0854

**DAVID K. CUNNINGHAM**  
Deputy Duchesne County Attorney

Attorneys for Appellee

**IN THE UTAH COURT OF APPEALS**

---

<b>STATE OF UTAH,</b>	:	
<b>Plaintiff/Appellee,</b>	:	
<b>v.</b>	:	
<b>KENT KYLE STRINGHAM</b>	:	<b>Case No. 20020591-CA</b>
<b>Defendant/Appellant.</b>	:	

---

**PETITION FOR REHEARING**

-----

**JULIE GEORGE**  
32 Exchange Place, Suite 101  
Salt Lake City, Utah 84111

**Attorney for Appellant**

**MARIAN DECKER (5688)**  
Assistant Attorney General  
**MARK L. SHURTLEFF (4666)**  
Utah Attorney General  
160 East 300 South, 6<sup>th</sup> Floor  
Salt Lake City, Utah 84114-0854

**DAVID K. CUNNINGHAM**  
Deputy Duchesne County Attorney

**Attorneys for Appellee**

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
QUESTION PRESENTED .....	1
RELIEF SOUGHT .....	1
ARGUMENT	
THIS COURT SHOULD DISMISS DEFENDANT’S APPEAL AS PREMATURE BECAUSE THE MINUTE ENTRY DENYING DEFENDANT’S MOTION TO WITHDRAW HIS GUILTY PLEA WAS UNSIGNED AND CONSEQUENTLY THERE IS NO FINAL APPEALABLE ORDER .....	2
CONCLUSION .....	7
ADDENDUM - <i>State v. Stringham</i> , 2003 UT App 105 (Memorandum Decision)	

## TABLE OF AUTHORITIES

### STATE CASES

<i>Cahoon v. Cahoon</i> , 641 P.2d 140 (Utah 1982) .....	3
<i>Salt Lake City Corp. v. Layton</i> , 600 P.2d 538 (Utah 1979) .....	2
<i>State v. Gardner</i> , 2001 UT 41, P.3d 1043 .....	7
<i>State v. Gibbons</i> , 740 P.2d 1309 (Utah 1987) .....	2, 3, 4
<i>State v. Jiminez</i> , 938 P.2d 264 (Utah 1997) .....	6
<i>State v. Ostler</i> , 2001 UT 68, 31 P.3d 528 .....	3, 4, 5
<i>State v. Parsons</i> , 781 P.2d 1275 (Utah 1989) .....	4
<i>State v. Reyes</i> , 2002 UT 13, 40 P.3d 630 .....	3, 4
<i>State v. Stringham</i> , 2003 UT App 105 (unpublished) .....	2, 4, 5
<i>Summers v. Cook</i> , 759 P.2d 341 (Utah App. 1988) .....	3, 4

### STATE STATUTES

Utah Code Ann. § 77-13-6 (1999) .....	3, 5
Utah R. App. P. 3 .....	2, 4
Utah R. App. P. 4 .....	2, 4, 5, 6

IN THE UTAH COURT OF APPEALS

---

STATE OF UTAH,	:	
	:	
Plaintiff/Appellee,	:	
	:	
v.	:	
KENT KYLE STRINGHAM,	:	Case No. 20020591-CA
	:	
Defendant/Appellant.	:	

---

PETITION FOR REHEARING

-----

QUESTION PRESENTED

Should the Court amend its opinion to hold that defendant's appeal from the trial court's unsigned denial of his motion to withdraw his guilty plea is not late, but rather, premature?

RELIEF SOUGHT

The State does not dispute that the Court correctly dismissed defendant's appeal for lack of jurisdiction—the State disagrees only with how the Court reached that result. For reasons set forth below, the Court lacks jurisdiction here, not because defendant failed to timely file a notice appeal from the date of sentencing, but rather because defendant *prematurely* appealed from the trial court's *unsigned* denial of his motion to withdraw his guilty plea. The Court should therefore dismiss the appeal without prejudice and allow the trial court to enter a signed, final appealable order.

## ARGUMENT

### **THIS COURT SHOULD DISMISS DEFENDANT'S APPEAL AS PREMATURE BECAUSE THE MINUTE ENTRY DENYING DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA WAS UNSIGNED AND CONSEQUENTLY THERE IS NO FINAL APPEALABLE ORDER**

The Court dismissed defendant's appeal for lack of jurisdiction on the ground that "[defendant] was required to file the notice of appeal within thirty days of entry of the Judgment, Sentence, and Commitment, to be timely," and defendant did not do so. *State v. Stringham*, 2003 UT App 105 (unpublished) (a copy is attached). However, the Court's analysis overlooks that a defendant who pleads guilty cannot directly appeal from a judgment and commitment order. *See State v. Gibbons*, 740 P.2d 1309, 1311-1312 (Utah 1987). As a result of this oversight, the Court mistakenly runs the time for appeal in this guilty plea case from the order entering judgment rather than from the denial of the motion to withdraw the plea. Hence, the Court's discussion regarding the tardiness of the instant appeal is erroneous and should be corrected.

Rule 3(a) of the Utah Rules of Appellate Procedure requires that direct appeals be taken from "final orders and judgments." "A judgment is final when it ends the controversy between the parties litigant." *Salt Lake City Corp. v. Layton*, 600 P.2d 538, 539 (Utah 1979). In a criminal proceeding, the Judgment, Sentence, and Commitment Order is usually the final order that disposes of the case and starts running the thirty-day window to file an appeal from the conviction. *See Utah R. App. P. 4(a)* ("[T]he notice appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days

after the date of entry of the judgment or order appealed from”). However, post-judgment motions can also result in final appealable orders. *See Cahoon v. Cahoon* 641 P.2d 140, 142 (Utah 1982). Moreover, a defendant who challenges his guilty plea on appeal must first file a motion to withdraw the plea. *See Gibbons*, 740 P.2d at 1311-1312 (remanding to allow defendant to file a motion to withdraw guilty plea in a case where no motion had previously been filed but where notice of appeal was timely in order to avoid possibility that defendant could prosecute two appeals in the same case); *State v. Reyes*, 2002 UT 13, ¶ 3, 40 P.3d 630 (dismissing appeal for lack of jurisdiction because defendant did not timely move to withdraw his guilty plea); *Summers v. Cook*, 759 P.2d 341, 342, 344-345 (Utah App. 1988) (“In *Gibbons*, the Supreme Court determined that a defendant could not simply appeal a conviction based on a guilty plea. *Id.* at 1311-1312. Rather, defendant must first file a motion to withdraw plea, giving the court who took the plea the first chance to consider defendant’s arguments. If the motion is denied, defendant could then appeal—not from the conviction per se, but from the denial of the motion”).

He may file this motion until 30 days after sentencing. *State v. Ostler*, 2001 UT 68, ¶¶ 11-13, 31 P.3d 528 (holding “that the thirty-day limit for filing a motion to withdraw a guilty plea found in [UTAH CODE ANN. § 77-13-6(2)(b) (1999)], begins to run at the time the district court enters final judgment”). In this case, it is the trial court’s post-judgment order denying the motion that finally disposes of the case and which is a



final appealable order under Utah R. App. P. 3(a). *Ibid.* Consequently, a notice of appeal filed within 30 days of this denial is timely.

Based on the above, it is of no consequence here that defendant's motion to withdraw his guilty plea did not toll the time to appeal from the judgment under the pre-November 2002 rule 4(b), Utah Rules of Appellate Procedure, as found by this Court. *See Stringham*, 2003 UT App 105 (unpublished). Precisely because defendant pled guilty to the charges against him, he was precluded from directly appealing the judgment and commitment order.<sup>1</sup> *See Gibbons*, 740 P.2d at 1311-1312; *Reyes*, 2002 UT 13, ¶ 3; *Summers*, 759 P.2d at 342, 344-345. Defendant's appeal is thus from the post-judgment order denying his motion to withdraw his guilty plea. *Id.* It follows that the time for filing an appeal from the denial of a motion to withdraw a guilty plea runs from the date of the denial, not from the entry of judgment, as erroneously found by this Court. *See Stringham*, 2003 UT App 105 (unpublished).

Indeed, to hold as *Stringham* does effectively precludes defendants, who, like *Stringham*, file a timely motion to withdraw a guilty plea after the entry of judgment, *see Ostler*, 2001 UT 68, ¶¶ 11-13, but who do not obtain a ruling thereon within thirty-days after the entry of judgment.<sup>2</sup> Under the current decision, because the trial court did not

---

<sup>1</sup>While defendant would not be precluded from directly appealing a *sentence* entered pursuant to a guilty plea, *see State v. Parsons*, 781 P.2d 1275, 1278-79 (Utah 1989), defendant raises no issues regarding his sentence here.

<sup>2</sup>Notably, there is no pre-November 2002 rule or statute requiring trial courts to act on post-judgment motions to withdraw a guilty plea within the thirty-days following

deny defendant's timely post-judgment motion to withdraw until the fifty-fourth day after sentencing, defendant lost his right to challenge that denial. *See Stringham*, 2003 UT App 105 (unpublished). In extending the time to appeal the denial of a motion to withdraw a guilty plea from thirty-days after entry of the plea to thirty-days after sentencing, the supreme court in *Ostler* surely contemplated that defendants so doing would thereafter be able to appeal within thirty days of any subsequent denial of the motion, regardless of whether the denial occurs on the twenty-ninth, thirty-first, or, as here, the fifty-fourth day following sentencing. *Id.* at ¶¶ 11-13. Nothing in *Ostler* suggests that the supreme court meant to alter the traditional rule that an appeal from the denial of a motion to withdraw a guilty plea must be filed within thirty-days of the denial. *See, e.g.* Utah R. App. P. 4(a) ("the notice of appeal . . . shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from").

As to the effect of the 2002 amendment to rule 4(a), noted in *Stringham*, 2003 UT App 105, n.2, the 2002 amendment was clearly adopted in response to *Ostler*'s extension of the time to withdraw a guilty plea. *See Ostler*, 2001 UT 68, ¶¶ 11-13. In extending the time to appeal the denial of a motion to withdraw a guilty plea from thirty days after entry of the plea to thirty days after sentencing, *Ostler* virtually insured that motions to withdraw guilty pleas would not be decided prior to sentencing and thereby significantly

---

imposition of sentence or entry of judgment. However, section 77-13-6(2)(b) was recently amended to provide that a motion to withdraw must be filed before announcement of sentence and that the sentence "may not be announced unless the motion [to withdraw] is denied." *See* H.B. 238, Gen. Sess. (Ut. 2003).

increased the possibility that criminal defendants would file two separate appeals in the same case. For example, a defendant who timely moved to withdraw his guilty plea within 30 days after sentencing, likely would not receive a ruling on that motion until after the time for appealing his sentence had run. Thus, if the defendant is dissatisfied with his sentence, he must file a notice of appeal before the trial court rules on his motion to withdraw his guilty plea. If the trial court then denies his motion to withdraw his guilty plea, the defendant must file a second notice of appeal from the denial, thereby creating two appeals in the same case, although he could later move the appellate court to consolidate the two appeals. Under the 2002 amendment to rule 4(a), filing a motion to withdraw a guilty plea tolls the time for filing the notice of appeal until the “entry of the order . . . denying the motion to withdraw the plea,” and thereby precludes the above scenario of two appeals in the same case. Thus, the amendment is not reasonably read to suggest that a notice of appeal from the denial of a post-judgment motion to withdraw filed on the thirty-first, or even the fifty-fourth day after sentencing is late, regardless of whether the motion has been acted upon in that timeframe.

Rather, for the reasons originally set out in the State’s Motion to Dismiss Appeal for Lack of Jurisdiction, defendant’s notice of appeal, filed outside the thirty-days following sentencing, but prior to the entry of a final order, was premature, not late. Specifically, the trial court denied defendant’s motion to withdraw his guilty plea in an unsigned minute entry (R78-79), which is not a final appealable order for purposes of appeal. *See State v. Jiminez*, 938 P.2d 264, 264 (Utah 1997). And, absent an entry of a

final order, this Court lacks jurisdiction to hear an appeal. *Id.* Therefore, because defendant's notice of appeal from the unsigned order was premature rather than late, this case should be dismissed without prejudice to allow the trial court to enter a signed, final appealable order. *State v. Gardner*, 2001 UT 41, ¶ 10, P.3d 1043 (recognizing that defendant had not lost his right to appeal "[i]nsomuch as no order has yet been prepared," and directing that defendant "may file a new appeal after the trial court signs and enters the formal order").

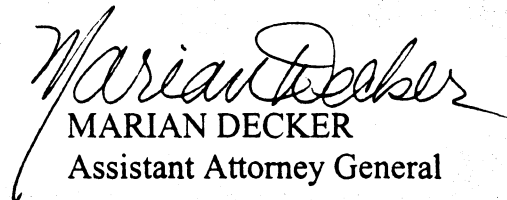
### CONCLUSION

The Court mistakenly ran the time for appeal in this guilty plea case from the judgment and commitment order and on that erroneous ground determined the notice was late. The State therefore asks the Court to amend its opinion to reflect that defendant's appeal from the unsigned denial of his motion to withdraw his guilty is premature, not late, and to dismiss the appeal without prejudice to allow the trial court to enter a signed and final appealable order.

The State certifies that this petition is presented in good faith and not for delay.

RESPECTFULLY submitted this 24<sup>th</sup> April 2003.

MARK SHURTLEFF  
Utah Attorney General

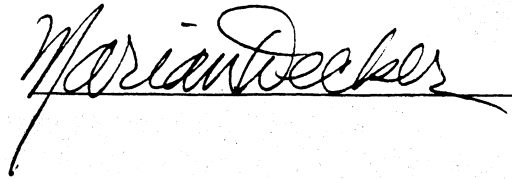
  
MARIAN DECKER  
Assistant Attorney General

## CERTIFICATE OF SERVICE

I hereby certify that on 24 April 2003, two copies of the foregoing PETITION  
FOR REHEARING were mailed, postage prepaid, to the following:

JULIE GEORGE  
32 Exchange Place, Suite 101  
Salt Lake City, Utah 84111

Attorney for Defendant/Appellant

A handwritten signature in cursive script, appearing to read "Mariantwecker", with a horizontal line extending from the end of the signature.

## Addenda

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

State of Utah,  
Plaintiff and Appellee,

v.

Kyle Kent Stringham,  
Defendant and Appellant.

MEMORANDUM DECISION

(Not For Official Publication)

Case No. 20020591-CA

F I L E D

(April 10, 2003)

2003 UT App 105

-----

Eighth District, Duchesne Department  
The Honorable A. Lynn Payne

Attorneys: Julie George, Salt Lake City, for Appellant

Mark L. Shurtleff and Marian Decker, Salt Lake City, for Appellee

-----

Before Judges Jackson, Billings, and Bench.

PER CURIAM:

This case is before the court on Appellee's motion to dismiss for lack of jurisdiction because of an untimely notice of appeal. See Utah R. App. P. 10(a). The Judgment, Sentence, and Commitment in this case was entered on May 22, 2002. A motion to withdraw the guilty plea was filed on June 6, 2002, and an unsigned minute entry denying that motion was entered July 15, 2002.<sup>(1)</sup> A notice of appeal was filed on July 16, 2002.

Appellee contends that the notice of appeal was premature because

Appellant appeals from an unsigned minute entry denying his motion to withdraw his plea. However, the notice of appeal was not premature; it was filed late. Appellant may not appeal a plea of guilty unless he moves to withdraw the plea in the trial court. See State v. Reyes, 2002 UT 13, ¶10, 40 P.3d 630. However, the rule in effect at all times relevant to this appeal did not include a motion to withdraw a plea among those post-trial motions that toll the time for filing a notice of appeal. See Utah R. App. P. 4(b) (enumerating those post-trial motions that toll the time for filing of the notice of appeal). For this reason, Appellant was required to file the notice of appeal within thirty days of entry of the Judgment, Sentence, and Commitment, to be timely. He did not do so.

Because the notice of appeal was untimely, we lack jurisdiction over the appeal. See Varian-Eimac, Inc. v. Lamareaux, 767 P.2d 569, 570 (Utah Ct. App. 1989) ("When a matter is outside the court's jurisdiction it retains only the authority to dismiss the action.").

We dismiss the appeal as untimely.

---

Norman H. Jackson,

Presiding Judge

---

Judith M. Billings,

Associate Presiding Judge

---

Russell W. Bench, Judge

.. The trial court minute entry erroneously characterizes the motion as one for a new trial, but no motion for a new trial was filed. Clearly, this was a clerical error and the docket should show Appellant's motion as a motion to withdraw his plea.

2. Utah R. App. P. 4(b) was amended in November of 2002 to include a motion to withdraw a plea among those post-trial motions that toll the time for filing the notice of appeal. However, our analysis is based upon the rule in effect at the time of this case.