2002

State of Utah v. Angel Balderrama : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
ANGEL BALDERRAMA,	:	Case No. 20020186-CA
Defendant/Appellant.	:	

BRIEF OF APPELLANT

Appeal from a judgment of conviction for driving under the influence of alcohol, a class B misdemeanor, in violation of Utah Code Ann. § 41-6-44 (1999), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Paul G. Maughan, Judge, presiding.

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JURISDICTIONAL STATEMENT

Appellant/Defendant Angel Balderrama ("Appellant" or "Balderrama") appeals from a conviction for Driving Under the Influence, a class B misdemeanor. R. 35. This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(e) (2002). A copy of the judgment is in Addendum A.

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

Issue #1: The Salt Lake Legal Defender Association ("LDA") was appointed at arraignment to represent Balderrama. Balderrama was brought before the trial court without counsel after he did not appear for trial and was subsequently picked up on a bench warrant. The first issue on appeal is whether Balderrama's conviction and jail sentence should be vacated because he did not make a constitutionally valid waiver of his right to counsel prior to pleading guilty.

Preservation. Balderrama's claim that his plea should be vacated because he was deprived of his right counsel was preserved. R. 26, 66:2-9. Balderrama also argued that

Alabama v. Shelton, 535 U.S. 654 (2002) applied, thereby preserving a claim that a jail sentence or suspended jail sentence could not be imposed. Alternatively, even if the claims were not preserved, this Court can review the claim under the plain error doctrine. See discussion infra at 24-27.

Standard of Review. The question of whether a defendant knowingly, intelligently and voluntarily waived his right to counsel is a mixed question of law and fact. State v. Heaton, 958 P.2d 911, 914 (Utah 1998). The trial court's factual findings are therefore reviewed for clear error and the legal conclusions are reviewed for correctness. State v. Vancleave, 2001 UT App 228, ¶5, 29 P.3d 680. In the event the claim is reviewed under the doctrine of plain error, Balderrama must show that "'(i) an error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful.'" State v. Dean, 2002 UT App 323, ¶3, 57 P.3d 1106 (quoting State v. Hittle, 2002 UT App 134, ¶5, 47 P.3d 101).

Issue #2: In taking the plea, the trial judge did not comply with due process or rule 11 of the Utah Rules of Criminal Procedure ("rule 11"). Defense counsel filed a motion to withdraw the guilty plea and pointed out that Balderrama did not understand the rights he was waiving when he pled guilty, but focused primarily on the denial of the right to counsel. The second issue is whether the plea should be vacated based on the due process and rule 11 violations regardless of whether defense counsel challenged the plea on those grounds in the trial court.

Preservation. Balderrama filed a timely motion to withdraw his guilty plea which was heard and denied by the trial judge. R. 26, 66. Although Balderrama focused on the deprivation of his right to counsel as the basis for withdrawing his plea, he also informed the trial court that he was not informed of his rights when he pled guilty, thereby preserving his due process and rule 11 claims for review. Alternatively, these claims can be reviewed under the doctrine of plain error. See Dean, 2002 UT App 323, ¶¶4-9 (an appellate court can review a guilty plea for plain error when a defendant timely moves to withdraw the guilty plea on other grounds).

Standard of Review. "'"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 UT App 28, ¶6, 996 P.2d 1065, affirmed, 2001 UT 68, 31 P.3d 528 (quoting State v. Benvenuto, 1999 UT 60, 893 P.2d 556, 558 (Utah 1999) (quoting State v. Holland, 921 P.2d 430, 433 (Utah 1996))). To the extent the guilty pleas are reviewed under the plain error doctrine, Balderrama "'has the burden of showing (i) an error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful.'" Dean, 2002 UT App 323, ¶3 (further citation omitted); see discussion infra at 40-43.

TEXT OF RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS

The texts of the following rule and constitutional provisions are in Addendum B:

Sixth Amendment, United States Constitution;

Due Process Clause, Fourteenth Amendment, United States Constitution;

Rule 11, Utah Rules of Criminal Procedure.

STATEMENT OF THE CASE

On October 11, 2001, the state filed an Information charging Balderrama with driving under the influence of alcohol ("DUI") and three other driving related charges. R. 2, 8. Balderrama appeared for arraignment on December 13, 2001 and requested that counsel be appointed to represent him. R. 14, 53; 69:2. Balderrama told the judge at arraignment that he intended to fight the charge. R. 69:2. The trial court appointed LDA to represent Balderrama. R. 14, 53.

At a pretrial conference on February 4, 2001, a jury trial was scheduled for March 19, 2002. R. 53-4. Defense counsel was present on March 19, 2002, but Balderrama did not appear. R. 54. The judge issued a bench warrant based on the failure to appear. R. 16-17, 54.

Balderrama was booked on the bench warrant on June 6, 2002. R. 55. He was in jail and appeared before the trial judge on June 10, 2002 for a bench warrant hearing. R. 55. Counsel was not present. At the bench warrant hearing, acting without counsel, Balderrama pleaded guilty to DUI. R. 55, 65. The judge ordered that a presentence report be prepared and released Balderrama pending sentencing. R. 55. The judge also reappointed LDA for the purposes of sentencing. R. 55.

On July 17, 2002, prior to sentencing, defense counsel filed a timely motion to withdraw Balderrama's guilty plea. R. 26, 56; see motion to withdraw guilty plea in Addendum C. The motion was argued on July 29, 2002, prior to imposition of sentence. R. 56-7, 66. The trial judge denied the motion and sentenced Balderrama to 180 days in jail; the judge suspended 178 of those days and required Balderrama to serve two days in jail. R. 34, 35, 56-7. Balderrama filed a timely notice of appeal on August 21, 2002. R. 36.

STATEMENT OF THE FACTS

According to the Information, a highway patrol trooper saw Balderrama make an abrupt lane change without signaling, then travel at 60 miles per hour in a 55 mile per hour speed zone. R. 3-4. The trooper stopped the vehicle Balderrama was driving and subsequently arrested Balderrama for DUI and other driving related charges. R. 3-4. At the arraignment held on December 13, 2001, the judge appointed LDA to represent Balderrama. R. 14, 53. At a pretrial conference held on February 4, 2002, the matter was scheduled for a jury trial on March 19, 2002. R. 53-4. Defense counsel appeared at the scheduled jury trial but Balderrama did not; the judge issued a bench warrant for Balderrama's arrest. R. 16-17.

Balderrama was booked on that bench warrant on June 6, 2002. R. 55. After being held in jail for several days, Balderrama was brought before the judge on June 10, 2002. R. 65. Counsel was not present. R. 65. After Balderrama attempted to explain

why he had not been at the jury trial, the trial judge indicated that Balderrama would be brought back before the court at 1:30 p.m. that day. R. 65:3. Balderrama told the judge that he had another court date at that time. R. 65:3. The trial judge then told Balderrama the matter would be rescheduled two weeks later on June 24th at 1:30 p.m. and that Balderrama's attorney would be notified. R. 65:3.

After being told that the matter would not be heard for two weeks, Balderrama asked if things could be resolved that day. R. 65:3. In response to that request, the judge asked Balderrama if he wanted to waive his right to an attorney, and Balderrama said that he did because he just wanted to get out of jail to "take care of [his] kids." R. 65:3-4. The trial judge did not discuss the dangers and disadvantages of representing one's self or otherwise conduct the colloquy necessary to establish a waiver of the right to counsel. R. 65. The entire exchange regarding the right to counsel is set forth below:

> THE COURT: We'll have you come back at 1:30 this afternoon - -
>
> MR. BALDERRAMA: I have a - - I have another afternoon court, your Honor.
>
> THE COURT: Okay. Then we'll come back on June 24th at 1:30. Set it for pre-trial, we'll notify your attorney that you're here and we'll see if we can resolve it then. If not, we'll set it for trial.
>
> MR. BALDERRAMA: I would like to resolve it today if there - - if there's any possible way, your Honor. I would really like to resolve it today. I want to take care of everything. I would like to start - - whatever's going to happen, I would like to happen today, if you don't mind, your Honor.
>
> THE COURT: Mr. Balderrama, you are entitled to an attorney, do you understand that?

MR. BALDERRAMA: Yes, I do, your Honor.

THE COURT: If you can't afford one, we'd appoint one for you; do you understand that?

MR. BALDERRAMA: Yes, I do, your Honor.

THE COURT: Is anybody forcing you to do this?

MR. BALDERRAMA: No, your Honor. I just want to get out so I can take care of my kid, your Honor. I just want to get ready and do my time and if there's any, just want to get - get it over with, so I can get out and take care of my kids, your Honor, to --

R. 65:3-4; see transcript of bench warrant/plea hearing in Addendum D.

After this discussion about proceeding without counsel, the trial court asked the prosecutor whether any plea bargain was available. R. 65:4-5. The prosecutor did not have a file and indicated that it had been a long time since he had done a DUI case, but said that he thought the standard offer of dismissing the minor traffic matters in exchange for a plea on the DUI would be appropriate. R. 65:5. The judge then asked Balderrama how he wished to plead on the charge of driving under the influence. R. 65:5. Balderrama said: "Guilty." R. 65:5.

Following Balderrama's statement that he was pleading guilty, the judge asked Balderrama what other charges were holding him. R. 65:6. The judge then asked whether Balderrama had been drinking and driving. R. 65:6. Balderrama responded that he had a couple beers but was not intoxicated. R. 65:6-7. Balderrama also told the judge

that the breath test had come back inconclusive and there was no blood alcohol result. R. 65:6-7.

Other than asking Balderrama whether he had been drinking and driving and informing Balderrama that he had only thirty days to file a motion to withdraw his plea, the judge made no attempt to comply with rule 11 or due process. R. 65. Among other things, the judge did not advise Balderrama of the constitutional rights he was waiving or the potential penalties for the crime of DUI. R. 65. Nor did the judge use an affidavit or videotape. R. 65.

After accepting the guilty plea, the judge referred Balderrama for a presentence report, scheduled a sentencing date and reappointed counsel for the purposes of sentencing. R. 65:7. The judge released Balderrama on the charge and told him that as soon as he got out of jail, he needed to go to county probation services for the preparation of a presentence report. R. 65:7. Balderrama then asked if he could get a pretrial release and the judge responded that he was not going to hold Balderrama on this charge. R. 65:7. Balderrama repeated his question, indicating that he did not understand what was going on. R. 65:7-8.

> MR. BALDERRAMA: So, you're not going to hold me on this no more, your Honor? So there's no longer bail? I'm pretty much released.
>
> THE COURT: Not on this case, but you have other cases, I'm not addressing those.
>
> MR. BALDERRAMA: Okay.

THE COURT: Okay.

MR. BALDERRAMA: So, can you please explain to me what's - - what's going on? I don't really understand what you're telling me.

THE COURT: You need to go to Probation Services and get a pre-sentence report. We'll let them know that you're in jail and they'll probably come to you there. If you get out quickly, then you need to go to them, we'll give you the address.

MR. BALDERRAMA: Okay.

THE COURT: Okay.

MR. BALDERRAMA: Thank you, your Honor. You're no longer holding me on this (inaudible) until I see the Court, right? See the pre-sentence report; is that what it is?

THE COURT: I've told you three times.

MR. BALDERRAMA: Right. *I just really don't understand the law, your Honor.*

R. 65:7-8 (emphasis added). The plea hearing then concluded.

Balderrama met with the presentence interviewer on July 2, 2002. R. 25. Balderrama maintained his innocence and told the interviewer that he intended to withdraw his plea. R. 25. According to the interviewer, Balderrama decided to withdraw his plea "when it became apparent to him that pleading guilty would not simply 'get this over with' as he had assumed, and that he would be required to abide by at least the minimum mandatory statutory guidelines." R. 25.

Prior to sentencing, defense counsel filed a motion to withdraw the guilty plea. R. 26. The basis for the withdrawal articulated in the motion was that an attorney was

not present. R. 26. At the hearing on the motion to withdraw the guilty plea, counsel argued that the plea was taken in violation of State v. Frampton, 737 P.2d 183 (Utah 1987) and Shelton, 535 U.S. 654, that Balderrama did not knowingly waive his right to counsel, and that Balderrama did not understand his rights when he pled guilty. R. 66:2-5, 6, 7.

When defense counsel told the judge that Balderrama was not aware of his rights, the judge responded, "... well, it seems like he knows enough about them to tell you what they are." R. 66:7. The judge also suggested that a waiver of counsel pursuant to Frampton was not necessary when the charge was for a misdemeanor. R. 66:3. The judge denied the motion to withdraw the guilty plea, stating that defense counsel had not provided any evidence demonstrating that the plea was not knowing. R. 66:9. The judge then proceeded with sentencing and imposed a jail sentence despite the claim that Shelton was being violated. R. 66:3, 6, 12-13.

SUMMARY OF THE ARGUMENT

Point I. Balderrama's Right to Counsel Was Violated. The Sixth Amendment right to counsel applies in any case where a defendant receives an actual or suspended jail sentence. Because the penalty for DUI includes a mandatory jail sentence and Balderrama was sentenced to an actual as well as suspended jail sentence, Balderrama had a Sixth Amendment right to counsel when he entered his guilty plea.

Balderrama's Sixth Amendment right to counsel was violated in this case where the trial court failed to conduct a colloquy that demonstrated a constitutionally adequate waiver of the right to counsel. The trial court did not ascertain whether Balderrama possessed the intelligence and capacity to understand and appreciate the consequences of representing himself, did not ascertain whether Balderrama understood the nature of the charges and proceedings, did not inform Balderrama of the potential penalties, and did not otherwise make Balderrama aware of the dangers and disadvantages of representing himself or establish that Balderrama knew what he was doing. Moreover, while there are no exceptional circumstances that would justify the review of the entire record in this case, even if the entire record is reviewed, it fails to demonstrate a constitutionally adequate waiver of the right to counsel and instead shows that Balderrama was confused and did not understand the dangers and disadvantages of proceeding without counsel.

The violation of the Sixth Amendment requires that the trial court's denial of Balderrama's motion to withdraw his guilty plea be reversed. Moreover, the actual and suspended jail sentences were illegally imposed. This issue was preserved for review, but even if it was not, this Court can vacate the plea and sentence pursuant to the plain error doctrine.

Point II. The Plea was Taken in Violation of Due Process and Rule 11. The plea was also taken in violation of due process and rule 11. The trial court did not inform Balderrama of the nature or elements of the charge or the potential penalty and did not

make sure that Balderrama understood the relationship between his conduct and the law. Additionally, the trial court did not inform Balderrama of the constitutional rights he was waiving by pleading guilty and did not make sure that Balderrama understood that he was waiving those rights by pleading guilty. Moreover, the trial court made no effort to comply with rule 11 and violated numerous provisions of that rule.

Balderrama preserved his claim that his plea should be withdrawn because the trial court did not strictly comply with due process and rule 11 by informing the trial court at the motion to withdraw the plea hearing that Balderrama had not understood his rights. Even if this claim was not preserved, however, Balderrama's plea should be vacated because the trial court committed plain error in taking that plea.

Balderrama filed a timely motion to withdraw his guilty plea. This Court therefore has jurisdiction to conduct a plain error review of that plea.

The trial court's failure to strictly comply with due process and rule 11 was obvious in light of case law from this Court and the United States Supreme Court as well as the language of rule 11. The error was harmful and requires vacation of the plea as recognized by Utah appellate courts in many cases.

ARGUMENT

POINT I. THE VIOLATION OF BALDERRAMA'S RIGHT TO COUNSEL REQUIRES THAT THE PLEA AND JAIL SENTENCE BE VACATED.

At the plea hearing, the trial court did not conduct a colloquy to determine whether Balderrama understood the risks and disadvantages of proceeding without counsel and did not otherwise make any effort to determine whether Balderrama knowingly waived his right to counsel. Instead, the trial judge simply informed Balderrama that he had a right to court appointed counsel and asked whether Balderrama waived that right. R. 65:3-4. In addition to the lack of adequate colloquy, the record as a whole demonstrates that Balderrama did not knowingly waive the right to counsel. Because Balderrama did not knowingly waive the right to counsel, the Sixth Amendment was violated in taking the plea. This Sixth Amendment violation requires that the plea be withdrawn and that the jail sentence be stricken.

A. THE TRIAL COURT ERRED IN REFUSING TO ALLOW BALDERRAMA TO WITHDRAW HIS GUILTY PLEA AND IN IMPOSING A JAIL SENTENCE WHERE THE RECORD DEMONSTRATES THAT BALDERRAMA'S SIXTH AMENDMENT RIGHT TO COUNSEL WAS VIOLATED IN TAKING THE PLEA.

1. The plea was taken in violation of the Sixth Amendment because Balderrama did not make a constitutionally valid waiver of his right to counsel.

The Sixth Amendment to the United States Constitution provides, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." This amendment, applicable to the states through the Fourteenth Amendment, guarantees an accused the right to counsel and requires appointment of counsel if the defendant is indigent. Heaton, 958 P.2d at 917 (citing

inter alia Gideon v. Wainwright, 372 U.S. 335, 342-44 (1963) and Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938)); see also Utah Code Ann. § 77-32-301 (1999); Argersinger v. Hamlin, 407 U.S. 25 (1972); Shelton, 535 U.S. 654.

The constitutional right to counsel applies to misdemeanors as well as felonies whenever actual imprisonment or a suspended jail sentence is involved. Argersinger, 407 U.S. at 28-37; Shelton, 535 U.S. 654. In Argersinger, the Court recognized the importance of the right to counsel in ensuring the fairness of a proceeding, and held "that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at trial." Argersinger, 407 U.S. at 31, 37. The United States Supreme Court recently reiterated the importance of the right to counsel, and clarified that such right attaches any time a jail sentence or suspended jail sentence is imposed. See Shelton, 535 U.S. at 654.

Because the penalty for DUI includes a mandatory jail sentence (see Utah Code Ann. § 41-6-44(4) (Supp. 2002)), a defendant charged with DUI has a Sixth Amendment right to counsel. In this case, where Balderrama was being held in jail when he pleaded guilty and was subsequently sentenced to an actual as well as a suspended jail sentence, there is no question that Balderrama had a Sixth Amendment right to counsel at the plea hearing.

Violation of the Sixth Amendment right to counsel "stands as a jurisdictional bar to a valid conviction and sentence depriving [a defendant] of his life or his liberty." Johnson, 304 U.S. at 467. In other words, unless the right to counsel is properly waived, a court cannot enter a valid conviction or sentence. Id.; see also Argersinger, 407 U.S. at 31.

Because of the fundamental and important role played by the right to counsel in a criminal proceeding, courts are required to "jealously protect[]" that right. Heaton, 958 P.2d at 917. The trial judge has the "weighty responsibility ... of determining whether there is an intelligent and competent waiver by the accused." Id.; see also State v. Bakalov, 849 P.2d 629, 633 (Utah Ct. App. 1993) ("Bakalov I"); State v. Bakalov, 862 P.2d 1354, 1355 (Utah 1993) ("Bakalov II"); Frampton, 737 P.2d at 187. There is a presumption against waiver of the right to counsel, "and doubts concerning waiver must be resolved in the defendant's favor." Heaton, 958 P.2d at 917; see State v. Arguelles, 2002 UT 104, ¶70, 459 Utah Adv. Rep. 3 ("we indulge every reasonable presumption against waiver of the right [to counsel]").

"[B]efore the court may permit the defendant to proceed without the assistance of counsel, the court must conduct a thorough inquiry of the defendant to fulfill its duty of insuring that the defendant's waiver of counsel is knowingly, intelligently, and voluntarily made." Heaton, 958 P.2d at 917-18. The Utah Supreme Court recently reiterated that ". . . before a defendant can waive the right to counsel, 'the defendant

"should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open."'" Arguelles, 2002 UT 104, ¶70 (further citations omitted); see also State v. White, 56 N.Y.2d 110, 118 (N.Y. Ct. App. 1982) (stating that waiver of the right to counsel is not "a routine rubber-stampable formality . . ." and that "'a right too easily waived is no right at all'" (further citation omitted)).

The "preferred method of establishing the validity of a waiver is a colloquy on the record between the court and the defendant." Arguelles , 2002 UT 104, ¶70. This Court and the Supreme Court have repeatedly outlined the minimum requirements for such a colloquy, requiring that the trial court:

> (1) advise the defendant of his constitutional right to the assistance of counsel, as well as his constitutional right to represent himself; (2) ascertain that the defendant possesses the intelligence and capacity to understand and appreciate the consequences of the decision to represent himself, including the expectation that the defendant will comply with technical rules and the recognition that presenting a defense is not just a matter of telling one's story; and (3) ascertain that the defendant comprehends the nature of the charges and proceedings, the range of permissible punishments, and any additional facts essential to a broad understanding of the case.

Id. (citing Heaton, 958 P.2d at 918; State v. Petty, 2001 UT App 396, ¶6, 38 P.3d 998, cert. denied, 42 P.3d 951 (Utah 1992)); see also Frampton, 737 P.2d at 186-87 n. 12 (outlining questions a trial court could ask in ascertaining whether a defendant knowingly waives the right to counsel). "[O]n appeal, [the] focus is not solely on the trial court's express advice, [the court] must also examine whether the colloquy clearly

establishes the defendant's level of understanding." Petty, 2001 UT App 396, ¶6 (citing State v. McDonald, 922 P.2d 776, 779 (Utah Ct. App. 1996) (further citation omitted)).

When a trial court does not conduct a colloquy with the defendant to determine whether the defendant knowingly and voluntarily waives the right to counsel, appellate courts "will look to the record and make a de novo determination regarding the validity of the defendant's waiver only in extraordinary circumstances." Heaton, 958 P.2d at 918. In making that review, "`"[c]ourts indulge every reasonable presumption against waiver" of the [right to counsel].'" Id. at 917 (citations omitted).

In Petty, this Court held that Petty had not knowingly waived his right to counsel and reversed the conviction and remanded for a new trial. Petty, 2001 UT App 396, ¶11-12. After being informed that Petty wished to represent himself, the trial court conducted a brief colloquy with Petty. Id. at ¶7. During that colloquy, the trial court questioned Petty about his education and understanding of the system and advised him against proceeding without counsel. Id.

> The trial court inquired about Petty's education, his general understanding of the legal system, his knowledge of the Rules of Evidence and Procedure, and informed him that he had the right to counsel as well as the right to proceed pro se. The trial court also advised Petty against proceeding pro se and selected Petty's appointed counsel to act in a standby capacity.

Id. The trial court did not, however, "address whether Petty '"comprehended the nature of the charges and proceedings"' or '"the range of permissible punishments."' Id. (quoting Heaton, 958 P.2d at 918) (further citation omitted). This Court concluded that

"absent a discussion of the nature of the charges and the range of possible penalties Petty faced, we cannot say that Petty had a proper understanding of the '"dangers and disadvantages of self-representation."'" Id. at ¶8 (further citations omitted). Because the trial court "failed to ensure that Petty was fully informed of the risks involved when he made his choice to proceed pro se," this Court reversed Petty's conviction and remanded the case for a new trial. Id. at ¶12.

This Court's decision in Petty mandates that the conviction in this case be vacated. Like the judge in Petty, the trial judge in this case failed to discuss the nature of the charges and proceedings as well as the range of possible penalties. See id. at ¶12. The trial judge did not tell Balderrama the elements of the crime of driving under the influence or the penalty attached to that crime. This alone demonstrates that Balderrama did not knowingly and intelligently waive counsel. In addition, the trial judge in this case did not inquire about Balderrama's level of education, his understanding of the legal system, his knowledge of the rules of evidence and procedure, or make any effort to ascertain whether Balderrama possessed the intelligence and capacity to proceed without counsel. The colloquy in this case was therefore even more deficient than the colloquy in Petty. See id. at ¶7.

Rather than conducting an adequate colloquy, the judge simply asked Balderrama whether he waived his right to counsel, without making Balderrama aware in any way of the dangers and disadvantages of waiving counsel or the possible penalty he faced. An

examination of the colloquy in this case, like that in Petty, demonstrates "no indication of [Balderrama's] level of understanding concerning the nature of the charges against him, or the range of possible penalties he faced." Id. at ¶11.

The trial judge seemed to think that because Balderrama pled guilty, the judge was not required to question Balderrama as diligently as he would have been had Balderrama gone to trial or otherwise ascertain whether Balderrama understood the risks and disadvantages if proceeding without counsel. R. 66:3, 5-6. On the contrary, in order to ensure that a defendant understands the risks and disadvantages of proceeding without counsel, a trial court must ascertain whether the defendant understands the protections he is afforded, the nature of the proceedings, the potential penalties he is facing, and the alternatives available to him; this is especially important when a defendant is thinking about pleading guilty without legal assistance, thereby agreeing that a conviction be entered against him, and necessarily requires a determination that the defendant has a basic understanding of constitutional rights and procedural and evidentiary rules. See generally White, 56 N.Y.2d at 118 (vacating guilty plea because waiver of counsel was not constitutionally adequate).

Because the trial court in this case failed to inform Balderrama of the risks and disadvantages of proceeding without counsel or otherwise undertake "a sufficiently searching inquiry" (Id. at 117) to ensure that Balderrama understood the risks and disadvantages of proceeding without counsel, Balderrama did not make a constitutionally

valid waiver of his right to counsel. Balderrama's Sixth Amendment right to counsel was violated when he entered a guilty plea in the absence of counsel. Accordingly, the plea must be vacated.

The deficient colloquy requires that the plea be vacated and "[t]here are no extraordinary circumstances . . . which would justify [an] examination of the record" for a de novo determination as to whether Balderrama waived his right to counsel. Heaton, 958 P.2d at 919. Even if the record as a whole were reviewed, however, such a review further demonstrates that Balderrama was not advised of and did not understand the risks and disadvantages of proceeding pro se. In fact, a review of the plea hearing demonstrates Balderrama's confusion and lack of understanding. R. 65:7-8.

Balderrama indicated that he was pleading guilty because he just wanted to get out of jail. R. 65:4. After Balderrama pled guilty, the judge asked him what other charges he was being held on and how much longer he thought he would be held. Balderrama responded, "I - - I don't know, your Honor. I don't - - I'm just of up in the air, I don't know anything." R. 65:6. The judge then informed Balderrama that he was to go to probation services and get a presentence report as soon as he got out, then return for sentencing. R. 65:7. Balderrama asked whether that meant that he would be released. R. 65:7. The judge told Balderrama that he would not hold him on this case. Balderrama asked, "So there's no longer no bail? I'm pretty much released." R. 65:8. The judge again responded that Balderrama was not being held on this case. Balderrama then

asked, "So can you please explain to me what's - what's going on? I don't really understand what you're telling me." R. 65:8. The judge repeated the instructions and Balderrama, still confused, asked, "You're no longer holding me on this (inaudible) until I see the Court, right? See the pre-sentence report; is that what it is?" R. 65:8. Apparently becoming impatient with Balderrama's confusion, the judge responded, "I've told you three times." R. 65:8. The hearing then concluded with Balderrama again indicating his lack of understanding, saying "Right. I just really don't understand the law." R. 65:8. Balderrama's confusion and difficulty in understanding whether he was to be released along with his apparent misunderstanding that he would "just . . . get it over with" if he pled guilty demonstrates that he did *not* understand the nature of the proceedings or the risks and disadvantages of proceeding without counsel.

In addition, the remainder of the record fails to suggest that Balderrama was informed of or understood the risks and disadvantages of proceeding without counsel or the nature of the proceedings and charges. At the arraignment, Balderrama was not informed of the charges or the potential penalties. R. 69:2-3; see transcript of arraignment in Addendum E. Instead, the prosecutor indicated that she thought Balderrama intended to plead guilty. R. 69:2. Balderrama corrected her and asked that an attorney could be appointed so that he could fight the charges. R. 69:2. The pretrial conference was not recorded and the trial court file does not contain anything suggesting that Ballderrama was informed of the potential penalty for driving under the influence,

the elements the state must prove to establish that he was driving under the influence or the rights Balderrama would waive if he were to plead guilty without counsel. At the motion to withdraw/sentencing hearing, Balderrama and his counsel explained that Balderrama did not understand his rights and did not knowingly waive counsel. R. 66.

Because the record fails to demonstrate that Balderrama was informed of the risks and disadvantages of proceeding without counsel, the plea was taken in violation of the Sixth Amendment and must be vacated.

2. Imposition of a jail sentence and a suspended jail sentence violated the Sixth Amendment and *Alabama v. Shelton.*

The trial judge erred not only in refusing to allow Balderrama to withdraw his guilty plea, but also in imposing a two-day jail sentence along with a suspended jail sentence. In Argersinger, the United States Supreme Court held "that defense counsel must be appointed in any criminal prosecution, 'whether classified as petty, misdemeanor or felony,' [citation omitted] 'that actually leads to imprisonment even for a brief period.'" Shelton, 122 S.Ct. at 1767 (quoting Argersinger, 407 U.S. at 33, 37). The Court recently reiterated this requirement and clarified that a suspended jail sentence cannot be imposed unless counsel is appointed for the defendant. Shelton, 122 S.Ct. at 1769-74.

In this case, Balderrama was not represented by counsel when he pleaded guilty. As set forth above, he did not knowingly and intelligently waive his right to counsel. Pursuant to Argersinger and Shelton, the trial court erred in imposing a jail sentence and

a suspended jail sentence.

B. BALDERRAMA'S CLAIM THAT HIS PLEA SHOULD BE VACATED AND A SUSPENDED OR ACTUAL JAIL SENTENCE COULD NOT BE IMPOSED WAS PRESERVED; EVEN IF IT WAS NOT, THE DOCTRINE OF PLAIN ERROR ALLOWS THIS COURT TO REVIEW THE ISSUE.

1. Balderrama's claim that the trial court erred in refusing to withdraw his guilty plea is properly before this Court.

Balderrama preserved his claim that his plea should be vacated because he was deprived of his right to counsel by filing a timely motion to withdraw the guilty plea on these grounds. R. 26. At the hearing, defense counsel was under the impression that the matter had been argued by another LDA attorney earlier in the day. R. 66:2[1]. Nevertheless, defense counsel renewed the motion to withdraw the guilty plea, arguing that Balderrama's right to counsel was violated in this case where the record did not demonstrate a knowing waiver of the right to counsel. R. 66:2-9. The trial court denied the motion. R. 66:10. The issue was therefore preserved for review by this Court.

The trial judge indicated that he denied the motion to withdraw the guilty plea because Balderrama did not present any evidence and did not give the judge a transcript of prior proceedings. R. 66:8-9. Contrary to the judge's ruling, Balderrama was not required to present evidence or provide the court with a transcript of the hearing. The

[1] There is no record of a hearing on this case during the trial judge's 8:30 a.m. calendar and appellate counsel has been unable to locate any recorded hearing in this case on July 29, 2002 other than the hearing transcribed in R. 66.

record discloses that the trial court did not ensure that Balderrama made a constitutionally valid waiver of his right to counsel. R. 65. "A trial judge, like every other party to a proceeding, is charged with knowledge of what is in the record." State v. Samora, 2002 UT App 384, ¶21, 59 P.3d 604. Even in cases where a trial judge did not preside over a previous hearing, the judge is charged with knowledge of what occurred on the record in that hearing. Id. In this case, where the trial judge presided over the plea hearing and the record shows that a valid waiver was not taken, the trial judge had actual knowledge of the proceedings and is charged with knowledge of what occurred on the record.

Alternatively, even if Balderrama had not properly raised this issue, this Court can vacate the guilty plea because the judge plainly erred in failing to take a constitutionally adequate waiver of the right to counsel. "To establish plain error, an appellant must demonstrate that `(i) an error exists, (ii) the error should have been obvious to the trial court, and (iii) the error is harmful.'" State v. Pecht, 2002 UT 41, ¶18, 48 P.3d 931 (quoting State v. Dunn, 850 P.2d 1201, 1208 (Utah 1993)). The fact that Balderrama had the right to counsel was obvious in light of Argersinger and Shelton. The error in failing to conduct an adequate colloquy so as to ensure that Balderrama knowingly and voluntarily waived his right to counsel was obvious in light of Heaton, Bakalov I, and Frampton, among others. The error was harmful and requires reversal because Balderrama's Sixth Amendment right to counsel was violated. See Petty, 2001 UT App

396, ¶12 (new trial required where record does not show that defendant understood dangers and disadvantages of proceeding *pro se*); Dean, 2002 UT App 323, ¶12 (courts presume harm under plain error analysis when defendant is not informed of constitutional rights being waived); Heaton , 958 P.2d at 919 (new trial required when constitutional right to counsel is violated by failing to ensure constitutionally adequate waiver of right to counsel).

2. Balderrama's claim that the judge imposed an actual and suspended jail sentence in violation of the Sixth Amendment and *Shelton* is properly before this Court.

While Balderrama's written motion requested that he be permitted to withdraw his guilty plea because he was deprived of his right to counsel, he also argued at the hearing that Shelton controlled this case. R. 66: 2, 6. Because Shelton held that neither an actual nor a suspended jail sentence can be imposed when the right to counsel is violated, defense counsel's argument preserved a claim that a suspended or actual jail sentence was unlawful in this case where the record does not demonstrate a waiver of the right to counsel. Although the trial court indicated it was familiar with Shelton and Frampton, it nevertheless imposed an actual and a suspended jail sentence in this case despite the fact that Balderrama was deprived of his right to counsel when he pled guilty. The claim that the trial court erred in imposing an actual and suspended jail sentence in this case where Balderrama was deprived of his right to counsel when he pled guilty is therefore properly before this Court.

Alternatively, even if this claim was not properly preserved, this Court can nevertheless review the claim pursuant to the doctrine of plain error. "To establish plain error, an appellant must demonstrate that '(i) an error exists, (ii) the error should have been obvious to the trial court, and (iii) the error is harmful.'" Pecht, 2002 UT 41, ¶18 (quoting Dunn, 850 P.2d at 1208). As previously outlined, an error exists in this case because the trial court sentenced Balderrama to serve an actual and suspended jail sentence despite the fact that his right to counsel was violated when he pled guilty. The error in sentencing a defendant to jail when the right to counsel has been violated was obvious in light of Shelton, issued by the United States Supreme Court about two months before the sentencing in this case and referred to by defense counsel. See Shelton, 122 S. Ct. 1764; R. 66:2, 6. Moreover, the requirements for waiver of counsel had been thoroughly discussed in a number of Utah appellate decisions, including Bakalov I, Frampton, and Heaton, prior to the hearing in this case. The error in sentencing Balderrama to an actual and suspended jail sentence when the record does not demonstrate a knowing and intelligent waiver of the right to counsel was therefore obvious.

The obvious error in sentencing Balderrama to jail in the absence of counsel was harmful as recognized by the United States Supreme Court in Shelton. In Shelton, the Court held that a suspended jail sentence "may not be imposed unless the defendant was accorded 'the guiding hand of counsel' in the prosecution for the crime charged."

Shelton, 122 S.Ct. at 1767 (quoting Argersinger, 407 U.S. at 40). Shelton requires that a jail sentence be vacated when an indigent defendant was denied his right to counsel at the trial or plea stage. Id. The Utah Supreme Court decision in Heaton likewise requires that a conviction be vacated when the right to counsel was violated. Heaton, 958 P.2d at 919. Moreover, Utah appellate courts and the United States Supreme Court have recognized the harmful effect of proceeding at the trial stage without counsel. See Heaton, 958 P.2d at 917, 919 (recognizing prejudicial effect of proceeding without counsel where defendant did not waive counsel); Argersinger, 407 U.S. at 31 (noting that "[t]he assistance of counsel is often a requisite to the very existence of a fair trial" and pointing out the disadvantages of proceeding without counsel); Gideon, 372 U.S. at 342-44 (recognizing that assistance of counsel is critical in criminal cases); Petty, 2001 UT App 396, ¶12 (ordering new trial where record failed to demonstrate that defendant understood the dangers and disadvantages of proceeding *pro se*). The violation of Balderrama's right to counsel was harmful and requires that the jail sentence be vacated.

POINT II. THE GUILTY PLEA MUST BE VACATED BECAUSE IT WAS TAKEN IN VIOLATION OF DUE PROCESS AND RULE 11 OF THE UTAH RULES OF CRIMINAL PROCEDURE.

A. BALDERRAMA'S PLEA WAS TAKEN IN VIOLATION OF DUE PROCESS AND RULE 11, UTAH RULES OF CRIMINAL PROCEDURE.

1. The guilty plea was taken in violation of due process.

"A guilty plea must be knowingly and voluntarily made in order to protect a defendant's due process rights." State v. Stilling, 856 P.2d 666, 671 (Utah Ct. App. 1993) (citing State v. Gibbons, 740 P.2d 1309, 1312 (Utah 1987)). For a plea to be knowingly and voluntarily made, the record must show, among other things, that the defendant was informed of the nature of the charges and the elements of the crimes charged, and understood the relationship of the law to the facts. Gibbons, 740 P.2d at 1312. In addition, the record must show that the defendant intentionally waived various constitutional rights, including the right to trial by jury, the right to confrontation, and the privilege against self-incrimination. Boykin v. Alabama, 395 U.S. 238, 242-44 (1969).

> Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. [citation omitted]. Second, is the right to trial by jury. [citation omitted]. Third, is the right to confront one's accusers. [citation omitted]. We cannot presume a waiver of these three important federal rights from a silent record.

Id. at 244.

"[T]rial courts bear the burden of ensuring compliance with this rule." State v. Visser, 2000 UT 88, ¶11, 22 P.3d 1242 (citing Gibbons, 740 P.2d at 1312, 1313). "This means 'that the trial court [must] personally establish that the defendant's guilty plea is truly knowing and voluntary and establish on the record that the defendant knowingly waived his or her constitutional rights.'" Visser, 2000 UT 88, ¶11 (alteration in original) (citing State v. Abeyta, 852 P.2d 993, 995 (Utah 1993)). Due process is violated where

the record fails to demonstrate that the defendant knowingly and voluntarily waived his constitutional rights or fails to demonstrate that the defendant understood the elements of the crimes charged and the relationship between those elements and his actions. Boykin, 395 U.S. at 244; see also Gibbons, 740 P.2d at 1312.

In Boykin, 395 U.S. at 242-43, the Court held that plain error occurred where the trial judge accepted the defendant's guilty plea "without an affirmative showing that it was intelligent and voluntary." Id. at 242. The Court reasoned that a guilty plea is more than just a confession since it results in a conviction. Id. at 242. Since admission of a confession requires a "'reliable determination on the voluntariness issue,'" affirmance of a conviction requires that the record show that a guilty plea was knowingly and voluntarily made. Id. Because the record failed to demonstrate that Boykin was informed of the rights he was waiving or the elements of the charge, the Supreme Court held that due process was violated in taking the pleas.

The Utah Supreme Court likewise recognized in Gibbons that due process requires that the defendant must be given notice of the nature of the charges, and "must understand the elements of the crimes charged and the relationship of the law to the facts" for a plea to meet due process requirements. Gibbons, 740 P.2d at 1312. Additionally, the record must demonstrate that the defendant was informed of and understood the rights he was waiving for a guilty plea to be taken in compliance with due process. Id. In cases where the record does not show that the defendant was informed of

the rights he would be waiving by pleading guilty, the elements of the crime charged and the factual basis for the plea, due process is violated and the plea must be vacated. See e.g. Boykin, 395 U.S. at 244; Gibbons, 740 P.2d at 1312; State v. Breckenridge, 688 P.2d 440, 443-44 (Utah 1983).

The record in this case fails to demonstrate that Balderrama knowingly and voluntarily pleaded guilty, as required by due process. The plea was taken in violation of due process because the record (1) fails to demonstrate that Balderrama was informed of and knowingly and voluntarily waived his constitutional rights, and (2) fails to demonstrate that Balderrama was informed of the elements of the crime to which he pled guilty or understood the relationship of his conduct to the law. See R. 65.

After the prosecutor suggested that if Balderrama pleaded guilty to DUI, the remaining minor traffic violations would be dismissed, the judge simply informed Balderrama that he was "charged with driving under the influence of alcohol or drugs, a Class B misdemeanor" and asked Balderrama how he wished to plead. R. 65:5. Balderrama responded, "Guilty." R. 65:5. The trial court did not inform Balderrama of any of the rights he would be waiving if he were to plead guilty. R. 65. This means that the trial judge did not tell Balderrama that he would be waiving his right to a jury trial, his privilege against self-incrimination, or his right to confrontation of witnesses, among other things. R. 65. The trial judge did not use an affidavit in taking the plea and aside from asking Balderrama whether he waived counsel, the judge did not otherwise refer in

any way to the rights Balderrama was waiving by pleading guilty. The guilty plea in this case was taken in violation of due process where the record fails to demonstrate that the trial court informed Balderrama that he would be waiving various constitutional rights, including the right to a jury trial, the right to confrontation, and the privilege against self-incrimination, if he were to plead guilty. See Gibbons, 740 P.2d at 1311-13; Boykin, 395 U.S. at 243-44.

The plea was also taken in violation of due process because the record fails to demonstrate that Balderrama was informed of the elements of the charge to which he was pleading guilty, the potential penalty for DUI, or the relationship between Balderrama's actions and the elements of the crime. Gibbons,740 P.2d at 1312 (citing *inter alia* McCarthy v. United States, 394 U.S. 459 (1969)). At no point during the plea hearing did the judge inform Balderrama of the elements of the crime of driving under the influence. After Balderrama indicated that his plea was guilty, the judge asked him about other charges. R. 65:5-6. The judge then asked Balderrama whether he had been driving and drinking at the time alleged. R. 65:6. Balderrama responded that he had had some alcohol to drink but he was not drunk and the test results did not show a blood alcohol level. R. 65:6-7.

> MR. BALDERRAMA: I did have one drink, your Honor, yes, I did. And I did - - I did tell the police officer that I did have a couple beers, I was leaving the club, I was there for about an hour and had a couple beers and I got pulled over. And what happened was, I took the breathalyzer and - - and it came back inconclusive, there was not - - I wasn't drunk, but I didn't have any - - I mean, I was - - I did

> have a drink and I did drive, yes; but the - - the blood thing, or whatever it was, the test came back inconclusive. I didn't - - there was no alcohol level.

R. 65:6-7. Based on Balderrama's admission that he "had a couple of beers and [was] drinking and driving," the trial judge found that there was a factual basis for the plea and entered a conviction. R. 65:7.

Aside from the fact that the record fails to show that Balderrama was informed of the elements of the crime of DUI or that the state must prove those elements beyond a reasonable doubt in order to convict him, Balderrama's statement demonstrates that he did not understand the relationship between his actions and a conviction for DUI. In fact, although Balderrama acknowledged that he had been driving, he also indicated that he was not drunk and there was no blood alcohol result. In order to be convicted of driving under the influence of alcohol, a person driving a motor vehicle must either have a blood alcohol level of .08 or greater or be under the influence of alcohol to a degree that renders him "incapable of safely operating a motor vehicle." Utah Code Ann. § 41-6-44 (1998). Balderrama's statement that there was no blood alcohol result and he was not under the influence of alcohol indicates that there was no basis for a DUI conviction. See Id. In the absence of further questioning by the trial judge, this statement fails to demonstrate a factual basis for the plea and demonstrates that Balderrama did not understand the relationship between the charge of DUI and his actions.

The judge's finding that there was a factual basis for the plea does not undo the due process violation which occurred when the judge failed to inform Balderrama of the elements. Regardless of whether there is a factual basis for a plea, a defendant must be informed of the elements the state is required to prove in order to knowingly plead guilty. In addition, the judge's finding that there was a factual basis for the plea is erroneous since Balderrama's statement indicated that he was not drunk and there was no blood alcohol result. The judge's statement that "[having] a couple of beers and drinking and driving" constitutes a factual basis for a DUI conviction is incorrect and further demonstrates that Balderrama's guilty plea was not knowingly made. A person who drinks and drives is not guilty of DUI; instead, an individual must be affected by the alcohol to the point where it interferes with the ability to drive or have a blood alcohol level of .08 or greater. The record does not demonstrate either of these and therefore further fails to demonstrate that the plea was knowingly made.

Because the trial court failed to advise Balderrama, among other things, of the constitutional rights he would be waiving if he were to plead guilty, the elements the state must prove beyond a reasonable doubt to convict him, and the potential penalty for DUI, the plea was taken in violation of due process and must be vacated.

2. The guilty plea was taken in violation of rule 11, Utah Rules of Criminal Procedure.

The guilty plea also must be vacated since it failed to comply with rule 11, Utah Rules of Criminal Procedure. "Strict compliance with rule 11 is [ ] mandated" and

"requires that the trial court personally establish that the defendant's guilty plea is truly knowing and voluntary and establish on the record that the defendant knowingly waived his or her constitutional rights and understood the elements of the crime." Abeyta, 852 P.2d at 995 (citing Gibbons, 740 P.2d 1309). This means that the trial court must make "detailed and specific" findings that all of the criteria of rule 11(e) have been fulfilled. State v. Maguire, 830 P.2d 216, 217-18 (Utah 1992). Rule 11(e) states in part:

> 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 the plea is entered, including the possibility of 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.
>
> . . .

Utah R. Crim. P. 11(e).

The Supreme Court reiterated in Maguire that "(1) strict compliance with the elements of rule 11 is required in the taking of guilty pleas and (2) said compliance may be demonstrated on appeal by reference to the record of the plea proceedings." Maguire, 830 P. 2d at 217. Quoting this Court's decision in State v. Smith, the Supreme Court clarified that such strict compliance with rule 11 must "`be demonstrated on the record at the time the . . . plea is entered.'" Maguire, 830 P.2d at 217 (quoting State v. Smith, 812 P.2d 470, 477 (Utah Ct. App. 1991), cert. denied, 836 P.2d 1383 (Utah 1992)).

> "It is critical, however, that strict Rule 11 compliance be demonstrated on the record at the time the . . . plea is entered. Therefore, if an affidavit is used to aid Rule 11 compliance, it must be addressed during the plea hearing. The trial court must conduct an inquiry to establish that the defendant understands the affidavit and voluntarily signed it. . . . Any omissions or ambiguities in the affidavit must be clarified during the plea hearing, as must any uncertainties raised in the course of the plea colloquy. Then the affidavit itself, signed by the required parties, can be incorporated into the record."

Maguire, 830 P.2d at 217-18 (quoting Smith, 812 P.2d at 477).

In the present case, the trial judge made no attempt to comply with rule 11 during the plea hearing, did not use a plea affidavit, and did not make the required rule 11 findings. The multitude of rule 11 violations that occurred in this case require that Balderrama's guilty plea be set aside.

First, the trial judge did not strictly comply with rule 11(e)(1) because he did not ensure that Balderrama knowingly waived his right to counsel. As set forth in Point I above, the trial court did not ascertain whether Balderrama understood the risks and disadvantages of representing himself and otherwise did not obtain a constitutionally valid waiver of the right to counsel. Moreover, while the judge did tell Balderrama that he had the right to a lawyer and asked whether he waived that right, the judge did not make a finding, as required by rule 11(e)(1), as to whether Balderrama knowingly waived his right to counsel.

Second, the trial judge did not strictly comply with rule 11(e)(2) since he did not ascertain whether the pleas were voluntary and did not make a finding on this issue. As set forth in subpart (A) of this point, the trial court violated due process in failing to inform Balderrama of the rights he would be waiving if he were to plead guilty, failing to inform him of the elements of the crime, and failing to clarify the factual basis for the plea or to otherwise demonstrate the relationship between Balderrama's conduct and the elements of the charge. Additionally, the record demonstrates that Balderrama pled guilty only after he was informed that he would not be brought back before the judge for two weeks and incorrectly believed that he would resolve things that day by pleading guilty. Additionally, the trial court did not make any finding as to whether the plea was voluntary, as required by subsection (e)(2) of rule 11. Under these circumstances where the record does not demonstrate that the plea was voluntary and the trial court did not

make a finding as to the voluntariness of the plea, rule 11(e)(2) was violated.

Third, the record of the plea hearing shows that the trial judge failed to strictly comply with subsection (e)(3) of rule 11 which requires that the judge find that the defendant is aware of various constitutional rights he is waiving by pleading guilty. The judge did not refer to the presumption of innocence, the right against self-incrimination, the right to a speedy public trial before an impartial jury, the right to compel witnesses, or the right to confrontation and did not inform Balderrama that he was waiving these rights in pleading guilty. R. 65. Nor did the judge make a finding that Balderrama knowingly waived these rights. Rule 11(e)(3) was therefore violated in taking the plea.

Fourth, subsection (e)(4) of rule 11 was also violated in taking this plea. The judge did not explain the nature or elements of a DUI charge and did not tell Balderrama that the state would have to prove the elements beyond a reasonable doubt in order to convict him. R. 65. Nor did the judge make a finding that Balderrama understood the elements and that the state would have to prove them beyond a reasonable doubt in order to convict him. In addition, although the judge did find that there was a factual basis for the plea, that finding was erroneous because Balderrama's statement indicated that there was not a factual basis for the plea. See discussion supra at 32-3.

The judge also violated subsection (e)(5) of rule 11 which requires that the trial judge find that the defendant knows the minimum and maximum sentence for the crime. The judge did not inform Balderrama of the potential sentence and did not make a

finding that he knew the minimum and maximum sentence. R. 65. This failure to inform Balderrama of the potential sentence is an additional violation of rule 11.

Additionally, the judge violated subsection (e)(8) of rule 11 which requires that the judge find that the defendant was advised that the right to appeal is limited when one pleads guilty. The trial judge did not advise Balderrama that the right to appeal would be limited if he pled guilty and did not make the required finding that "the defendant has been advised that the right of appeal is limited."[2] R. 65.

The trial court failed to strictly comply with rule 11 in taking the plea. A plea that is taken in violation of rule 11 must be vacated. See State v. Tarnawiecki, 2000 UT App 186, ¶¶18-19, 5 P.3d 1222.

B. THE CLAIMS THAT THE PLEA WAS TAKEN IN VIOLATION OF DUE PROCESS AND RULE 11 ARE PROPERLY BEFORE THIS COURT AND REQUIRE THAT THE PLEA BE VACATED.

1. The due process and rule 11 claims were preserved by counsel's argument and Balderrama's statements that Balderrama did not know his rights when he pled guilty.

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[2] While the judge asked the prosecutor in front of Balderrama whether there was an offer on the case and the prosecutor responded that "the plea to the DUI would dismiss all other counts" (R. 65:4-5), the judge did not clearly state that the plea was the result of a plea agreement or make a finding to that effect, as required by rule 11(e)(6). Similarly, the judge did advise Balderrama that he had thirty days from sentencing in which to file a motion to withdraw his guilty plea, but did not make a finding that Balderrama had been so informed, as required by rule 11(e)(7). The technical violations of these two subsections do not reach the same magnitude as the flagrant violations of the other subsections.

Balderrama's claims that his plea was taken in violation of due process and rule 11 were preserved for appellate review by his argument at the motion to withdraw hearing that he was not informed of the rights he would be waiving by pleading guilty. R. 66:5, 7, 8, 10. In his written motion to withdraw the guilty plea, Balderrama stated that the ground for withdrawing the plea was that he had been deprived of his right to counsel. R. 26. At the hearing, defense counsel also stated that the basis for the motion to withdraw the guilty plea was that Balderrama did not have "an attorney present when he made his guilty plea." R. 66:6. The judge then asked, "[W]ell, what else?." R. 66:6. In response, defense counsel and Balderrama himself told the judge that in addition to not knowingly waiving counsel, Balderrama did not know he had certain constitutional rights. R. 66:7, 8. Counsel further indicated that Balderrama's right to due process was violated. R. 66:8.

> DEFENSE COUNSEL: It's our argument that it's per se, that if he didn't have counsel present, he didn't, he was not fully aware of the rights that he'd be waiving at a trial.
>
> THE COURT: That's the sole - -
>
> DEFENSE COUNSEL: That
>
> THE COURT: - - the sole basis?
>
> DEFENSE COUNSEL: Your Honor, other than the State Constitution and the Federal Constitution provisions guaranteeing the right to due process and to a fair trial - -

R. 66:8. Balderrama also told the court he did not know his rights when he pled guilty. R. 66:10.

While the argument for withdrawing the plea focused primarily on the violation of the right to counsel, it nevertheless alerted the judge that Balderrama was not informed of his rights when he pled guilty. In fact, the judge seemed to suggest that Balderrama knew his rights because he pled guilty and that the judge was not required to inform him regarding procedural rules or advise him as to the presumption of innocence. R. 66:4-5. The judge issued a ruling denying the motion to withdraw the plea. Accordingly, this issue is properly preserved for review.

2. Alternatively, this Court can vacate the plea under the plain error doctrine.

Balderrama filed a timely motion to withdraw the guilty plea in this case. R. 26. Because Balderrama filed a timely motion to withdraw his guilty plea, this Court has jurisdiction to review that plea for plain error. Dean, 2002 UT App 323, ¶9 (holding that an appellate court has jurisdiction to review a plea for plain error when a timely motion to withdraw is filed even if that motion does not state the grounds being reviewed).[3]

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[3] While this Court has jurisdiction to review the unlawful plea because Balderrama filed a timely motion to withdraw that plea, Balderrama also maintains that his plea could be reviewed pursuant to the doctrines of plain error and exceptional circumstances even if he had not filed such a motion. Although this Court has indicated that it cannot review a plea for plain error when a motion to withdraw that plea has not been filed in the trial court (see Dean, 2002 UT App 323, ¶7 (citing State v. Reyes, 2002 UT 13, ¶¶3-4, 40 P.3d 630)), Balderrama respectfully requests that such conclusion be re-examined.

This Court's decision that it does not have jurisdiction to review a plea for plain error is based on the Supreme Court decision in Reyes. Reyes was before the Supreme Court after the defendant filed a motion to correct an illegal sentence eight years after judgment was entered. Reyes, 2002 UT 13, ¶1. Although in the trial court the defendant filed a motion to correct an illegal sentence pursuant to rule 22(e), Utah Rules of Criminal Procedure, on appeal he did not address the claim that the trial judge had improperly denied that motion to correct an illegal sentence. Id., ¶2. Instead, Reyes claimed for the first time that his guilty plea had been entered in violation of rule 11, Utah Rules of Criminal Procedure. Id., ¶3. The Supreme Court held that it did not have jurisdiction to review the plea. Id. This holding is consistent with other Utah case law that limits a review under a rule 22(e) claim to the legality of the sentence and precludes review of the underlying conviction when the case is before the court pursuant to rule 22(e). See e.g. State v. Brooks, 908 P.2d 856, 860 (Utah 1995).

While the Supreme Court in Reyes did go on to say that it did not have jurisdiction to review the plea because Reyes did not move to withdraw the plea within thirty days of conviction (Id., ¶3), that statement is dictum since the heart of the holding in Reyes is based on the fact that the appeal was from an order denying a rule 22(e) motion rather than direct appeal of a criminal conviction. Although the Supreme Court has suggested in other cases that the right to attack a plea can be extinguished if a timely motion to withdraw the plea is not filed (see Abeyta, 852 P.2d at 995; State v. Ostler, 2001 UT 68, ¶10, 31 P.3d 528), it has yet to directly address the circumstances in this case where a criminal defendant is directly appealing a conviction and arguing that plain error requires that a guilty plea that was unquestionably taken in violation of rule 11 and due process be vacated.

Allowing a plain error review of a plea on direct appeal is consistent with the federal approach to reviewing patently illegal pleas. See United States v. Vonn, 122 S.Ct. 1043 (2002). Despite the more limited right to appeal in federal cases, the United States Supreme Court has recognized that it can review a plea for plain error when that issue is raised for the first time on direct appeal of a criminal conviction. Id. Reviewing a guilty plea for plain error is also consistent with the accepted approach of reviewing any criminal conviction for plain error when the defendant has timely appealed that conviction and fundamental fairness.

Moreover, Reyes did not consider whether the exceptional circumstances doctrine would allow review of a plainly invalid guilty plea when the issue is raised on direct appeal. In this case, exceptional circumstances justify review of the guilty plea because Balderrama was deprived of his right to counsel when he entered the plea.

"The exceptional circumstances concept serves as a 'safety device' to assure that 'manifest injustice does not result from the failure to consider an issue on appeal.'"

A plea must be vacated under the doctrine of plain error where an obvious error occurred in taking the plea. See Dean, 2002 UT App 323, ¶¶10-12. The trial court error in failing to comply with due process and rule 11 in taking Balderrama's plea was obvious in light of Boykin, Gibbons, Arguelles, the language of rule 11, and the multitude of cases from this Court and the Utah Supreme Court discussing the due process and rule 11 requirements in taking pleas. As set forth previously, the trial court failed to comply with most of the rule 11 requirements and failed to discuss the constitutional rights Balderrama was waiving by pleading guilty or ensure that Balderrama knowingly waived those rights when he pled guilty. The error was harmful because "the omission dealt with a substantial constitutional right." Dean, 2002 UT App

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State v. Irwin, 924 P.2d 5, 8 (Utah Ct. App. 1996), cert. denied, 931 P.2d 146 (Utah 1997) (citation omitted). Due to the fundamental nature of the right to counsel and the important role that right plays in the trial court, manifest injustice would result if this Court were to refuse to review a plea on direct appeal that was entered without benefit of counsel and which is patently illegal. Id. at 8.

Unlike Reyes where the Supreme Court clearly did not have jurisdiction to review the plea because the case was before it more than eight years after judgment on a motion to correct illegal sentence, this Court has jurisdiction over this case, including both the conviction and the sentence, because Balderrama directly appealed his conviction. It is fundamentally unfair to refuse to review a patently unlawful plea on direct appeal, particularly where the defendant was not represented by counsel below. Accordingly, while this Court need not reach this claim because Balderrama filed a timely motion to withdraw his guilty plea, Balderrama nevertheless maintains that even if he had not filed a motion to withdraw a guilty plea, this Court should review his clearly illegal plea for plain error and exceptional circumstances.

323, ¶12. "It is well established under Utah law that we will presume harm under a plain error analysis when a trial court fails to inform a defendant of his constitutional rights under rule 11." Id., citing Tarnawiecki, 2000 UT App 186, ¶18. Because the record demonstrates obvious error resulting in harm, the plea must be vacated.

ORAL ARGUMENT AND WRITTEN OPINION REQUESTED

Appellant requests that this Court calendar oral argument in this case and issue a written opinion, particularly as to the claim raised in Point I that Appellant's right to counsel was violated. Utah trial courts are grappling with the ramifications of the decision in Shelton. Although Utah case law indicates that Balderrama did not make a constitutionally valid waiver of the right to counsel, a written decision would nevertheless provide valuable guidance for state trial courts.

CONCLUSION

Defendant/Appellant Angel Balderrama respectfully requests that this Court reverse the trial court ruling and order that his guilty plea be vacated.

DATED this 30th day of January, 2003.

Joan C. Watt

JOAN C. WATT
Attorney for Defendant/Appellant

JOEL JONATHAN KITTRELL
Attorney for Defendant/Appellant

HEATHER BRERETON
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, JOAN C. WATT, hereby certify that I have caused to be delivered the original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, P. O. Box 140230, Salt Lake City, Utah 84114-0230, and four copies to the District Attorney's Office, 231 East 400 South, Salt Lake City, Utah 84111, this 30th day of January, 2003.

Joan C. Watt
JOAN C. WATT

DELIVERED to the Utah Court of Appeals and the District Attorney's Office as indicated above this _____ day of January, 2003.

ADDENDA

ADDENDUM A

Third District Court, State of Utah

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

SENTENCE/JUDGMENT/COMMITMENT/ORDER
Criminal/Traffic

CITY/STATE

Plaintiff

-VS-

Baldesrama, Angel
Defendant

DOB: 12/3/76

Interpreter

CHARGES Driving under the influence

Case Number 0159/0233

Tape number _____ C # _____

Date 7/29/02 Time _____

Judge/Comm Maughan

Clerk VB

Plaintiff Counsel _____

Defense Counsel Kittrell

Amended _____

Amended _____

THE COURT SENTENCED THE DEFENDANT AS FOLLOWS:

(1) Jail 180 days Suspended 178 days

Defendant to Commence Serving Jail Sentence _____

(2) Fine Amt. $ 1860.00 Susp. $ _____ Fee $ _____ Fine Bal $ 1850.00

TOTAL FINE(S) DUE $ 1850.00

Payment Schedule: Pay $ 50.00 per month/1st Pmt. Due 9/20/02 Last Pmt. Due _____

(3) Court Costs $ _____

(4) Community Service/WP _____ through _____

(5) Restitution $ _____ Pay to: ☐ Court ☐ Victim ☐ Show Proof to Court

Attorney Fees $ _____

(6) Probation 12 MO ☐ Good Behavior ☐ AP&P ☒ ACEC ☐ Other

(7) **Terms of probation:**

☐ No Further Violations
☐ AA Meetings _____ / wk _____ / month
☐ Follow Program
☐ No Alcohol
☐ Antibuse
☐ Employment _____
☐ Proof of _____

☐ Counseling thru _____
☒ Classes DUI, VIP
☐ In/Out Treatment _____
☐ Health Testing _____
☐ Crime Lab Procedure
☒ Credit for Classes
☒ Treatment
Interlock device .01

(8) Plea in Abeyance Diversion _____

(9) Review ___ / ___ / ___ at _____

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

Paul G. Maughan
District Court Judge

APPEAL MUST BE FILED WITHIN 30 DAYS OF JUDGEMENT By _____

ADDENDUM B

AMENDMENT VI

[Rights of accused.]

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

AMENDMENT XIV

Section 1. [Citizenship — Due process of law — Equal protection.]

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

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 C

JOEL J. KITTRELL (9071)
Attorney for Defendant
Salt Lake Legal Defender Association
424 East 500 South, Suite 300
Salt Lake City, UT 84111
(801) 532-5444

IN THE THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH

SALT LAKE DEPARTMENT

STATE OF UTAH,	:	**MOTION TO WITHDRAW DEFENDANT'S GUILTY PLEA**
Plaintiff	:	
-v-	:	
ANGEL BALDERAMMA	:	CASE NO. 015910233 JUDGE MAUGHAN
Defendant	:	

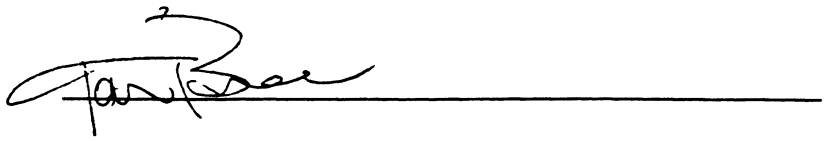
Comes now Defendant, ANGEL BALDERAMMA, by and through counsel, JOEL J. KITTRELL, and hereby moves this Court to withdraw his guilty plea on the grounds that no attorney was present for defendant.

DATED this 16th day of ~~May, 1999.~~ July, 2002.

for

JOEL J. KITTRELL
Attorney for Defendant

MAILED/DELIVERED a copy of the foregoing to the Office of The District Attorney, 2001 South State St., Salt Lake City, UT 84190-1200 this 16 day of July, 2002.



ADDENDUM D

IN THE THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH

SALT LAKE COUNTY, SALT LAKE DEPARTMENT

-oOo-

STATE OF UTAH, Plaintiff, vs. ANGEL BALDERRAMA, Defendant.	Case No. 015910233MS ENTRY OF PLEA/BENCH WARRANT HEARING (Videotape Proceedings)

-oOo-

BE IT REMEMBERED that on the 10th day of June, 2002, commencing at the hour of 9:30 a.m., the above-entitled matter came on for hearing before the HONORABLE PAUL G. MAUGHAN, sitting as Judge in the above-named Court for the purpose of this cause, and that the following videotape proceedings were had.

-oOo-

A P P E A R A N C E S

For the State: CHRISTOPHER BOWN
Deputy Salt Lake County
District Attorney
231 East 400 South, #300
Salt Lake City, Utah 84111

For the Defendant: ANGEL BALDERRAMA
Appearing Pro Se

20020786-CA

ALAN P. SMITH, CSR
385 BRAHMA DRIVE (801) 266-0320
SALT LAKE CITY, UTAH 84107

ORIGINAL

P R O C E E D I N G S

THE COURT: Is anybody else ready on a matter? If not, do we have Angel Balderrama?

MR. BOWN: Oh, yes, we do, your Honor.

THE COURT: Mr. Balderrama, do you need an interpreter?

MR. BALDERRAMA: No, your Honor.

THE COURT: Do you--this was set for a jury trial and you failed to appear; why was that?

MR. BALDERRAMA: I was on probation with Daniel Anderson. I had a--a little problem, I was supposed--I had--I came up with a dirty U.A. I was supposed to turn myself in on a Thursday, like three months ago. I got a call that morning from Child Protective Service saying that my son was taken away from me, they found him in a motel room with the mother. And I called my probation officer and I asked her if I could--if she'd give me a little bit more time to turn myself in, so I could wait out the court date, 'cause you know, how could a parent come to jail not knowing what's going to happen to his kids? And he lived with me and I just let him go with my--with his mother so I could--so I could come to jail the next day.

Well, anyway, that's all documented and everything and anyways, so I called my probation officer and I told her

that I--that I needed some more time. She told me no and I--I just--I couldn't deal with it, you know, my kid being gone and not knowing--coming to jail and not knowing what's going to happen to him.

THE COURT: How long have you been in jail?

MR. BALDERRAMA: I've been here since last week, but I--I've had time ser--I got time served on these charges before, I did time on them already.

THE COURT: We'll have you come back at 1:30 this afternoon--

MR. BALDERRAMA: I have a--I have another afternoon court, your Honor.

THE COURT: Okay. Then we'll come back on June 24th at 1:30. Set it for pre-trial, we'll notify your attorney that you're here and we'll see if we can resolve it then. If not, we'll set it for trial.

MR. BALDERRAMA: I would like to resolve it today if there--if there's any possible way, your Honor. I would really like to resolve it today. I want to take care of everything. I would like to start--whatever's going to happen, I would like to happen today, if you don't mind, your Honor.

THE COURT: Mr. Balderrama, you are entitled to an attorney, do you understand that?

MR. BALDERRAMA: Yes, I do, your Honor.

THE COURT: If you can't afford one, we'd appoint one for you; do you understand that?

MR. BALDERRAMA: Yes, I do, your Honor.

THE COURT: In fact, we already have. And if you go forward today, you'll be waiving your right to an attorney; do you understand that?

Do you understand that?

MR. BALDERRAMA: Yes, I do, your Honor.

THE COURT: Is anybody forcing you to do this?

MR. BALDERRAMA: No, your Honor. I just want to get out so I can take care of my kid, your Honor. I just want to get ready and do my time and if there's any, just want to get--get it over with, so I can get out and take care of my kids, your Honor, to--

THE COURT: Mr. Bown, I know this isn't your case and you probably don't have a file on it.

MR. BOWN: I do not, your Honor.

THE COURT: It's a misdemeanor DUI, with--in addition to the DUI, it's driving on a denied license, speeding and improper lane change.

Mr. Balderrama wishes to--he's waived his right to an attorney and would like to resolve it this morning; any objection from the State?

MR. BOWN: No, your Honor.

THE COURT: Is there an offer on this at all?

MR. BOWN: I don't deal with (inaudible) it's been a long time since I've done those. I--I would think that in this case, the plea to the DUI would dismiss all the other counts,--

THE COURT: Thank you.

MR. BOWN: --would be appropriate.

THE COURT: Thank you very much.

Mr. Balderrama, you're charged with driving under the influence of alcohol or drugs, a Class B misdemeanor that occurred February 27th of 2001 on northbound I-15 at 1000 South in Salt Lake County.

How do you wish to plead?

MR. BALDERRAMA: Guilty, your Honor.

THE COURT: Have you had more than one DUI in the last ten years?

MR. BALDERRAMA: No.

THE COURT: This is the first offense?

MR. BALDERRAMA: Yes.

THE COURT: What are you serving a commitment for right now?

MR. BALDERRAMA: I am still going to court on the other charges. I'm not serving any time right now. I'm just waiting for--

THE COURT: Well, you said you got credit for time served.

MR. BALDERRAMA: That's--that's for my other charges that I have, your Honor.

THE COURT: What--what are they?

MR. BALDERRAMA: It's a joy riding with intent, I think it's a third-degree felony, and tamp--tampering with a witness which is a Class A, but that's with another judge, that's what I--I'm here--I'm here for a probation violation is what it is.

THE COURT: For the joy riding?

MR. BALDERRAMA: Yeah, the joy riding and the tampering.

THE COURT: And what do you have this afternoon?

MR. BALDERRAMA: I don't know. I--it might be for the joy riding, third-degree felony. I'm not sure.

THE COURT: How much longer do you anticipate being held?

MR. BALDERRAMA: I--I don't know, your Honor. I don't--I'm just of up in the air, I don't know anything, really.

THE COURT: Mr. Balderrama, had you been driving and drinking at the time, on February 27th?

MR. BALDERRAMA: I did have a drink, your Honor, yes, I did. And I did--I did tell the police officer that I did have a couple beers, I was leaving the club, I was there for about an hour and had a couple beers and I got pulled

over. And what happened was, I took the breathalyzer and--and it came back inconclusive, there was not--I wasn't drunk, but I didn't have any--I mean, I was--I did have a drink and I did drive, yes; but the--the blood thing, or whatever it was, the test came back inconclusive. I didn't--there was no alcohol level.

THE COURT: Okay. Well, based upon your admission that you'd had--you'd had a couple of beers and drinking and driving, I find the factual basis for your plea, I'm going to enter it as a conviction.

Any attempt to withdraw the plea has to be filed in writing, based on good cause, within 30 days of sentencing. I'm going to order a pre-sentence report and have you back for sentencing. This can be through County Probation Services.

We'll have you back on July 29th at 1:30 for sentencing. We'll appoint you an attorney for the purposes of sentencing. That means as soon as you get out, you need to go to them if they haven't come to you while you're in jail; do you understand that?

MR. BALDERRAMA: Yes, I do, your Honor. And do--does this mean, can I--can I get like a--maybe like a pre-trial release on this, your Honor?

THE COURT: Well, I'm not going to hold you on this, I can't do anything (inaudible)

MR. BALDERRAMA: So, you're not going to hold me on

this no more then, your Honor? So, there's no longer no bail? I'm pretty much released.

THE COURT: Not on this case, but you have other cases, I'm not addressing those.

MR. BALDERRAMA: Okay.

THE COURT: Okay.

MR. BALDERRAMA: So, can you please explain to me what's--what's going on? I don't really understand what you're telling me.

THE COURT: You need to go to Probation Services and get a pre-sentence report. We'll let them know that you're in jail and they'll probably come to you there. If you get out quickly, then you need to go to them, we'll give you their address.

MR. BALDERRAMA: Okay.

THE COURT: Okay.

MR. BALDERRAMA: Thank you, your Honor.

You're no longer holding me on this (inaudible) until I see the Court; right? See the pre-sentence report; is that what it is?

THE COURT: I've told you three times.

MR. BALDERRAMA: Right. I just really don't understand the law, your Honor.

(Whereupon, this hearing was concluded.)

* * *

TRANSCRIBER'S CERTIFICATE

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

I, Toni Frye, do hereby certify:

That I am a transcriber for Alan P. Smith, Certified Shorthand Reporter and a Certified Court Transcriber of Tape Recorded Court Proceedings; that I received an electronically recorded videotape of the within matter and under his supervision have transcribed the same into typewriting, and the foregoing pages, numbered from 1 to 8, inclusive, to the best of my ability constitute a full, true and correct transcription, except where it is indicated the Videotape Recorded Court Proceedings were inaudible.

I do further certify that I am not counsel, attorney or relative of either party, or clerk or stenographer of either party or of the attorney of either party, or otherwise interested in the event of this suit.

Dated at Salt Lake City, Utah, this 14th day of October, 2002.

Toni Frye
Transcriber

Subscribed and sworn to before me this 14th day of October, 2002.

Alan P. Smith
Notary Public

(S E A L)

REPORTER'S CERTIFICATE

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

I, Alan P. Smith, Certified Shorthand Reporter, Notary Public and a Certified Court Transcriber of Tape Recorded Court Proceedings within and for the State of Utah, do certify that I received an electronically recorded videotape of the within matter and caused the same to be transcribed into typewriting, and that the foregoing pages, numbered from 1 to 8, inclusive, to the best of my knowledge, constitute a full, true and correct transcription, except where it is indicated the Videotape Recorded Court Proceedings were inaudible.

I do further certify that I am not counsel, attorney or relative of either party, or clerk or stenographer of either party or of the attorney of either party, or otherwise interested in the event of this suit.

Dated at Salt Lake City, Utah, this 16th day of October, 2002.

Notary Public

(S E A L)

ADDENDUM E

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

STATE OF UTAH,

Plaintiff,

vs.

ANGEL BALDERRAMA,

Defendant.

Case No. 015910233MS

ORIGINAL

Arraignment
Electronically Recorded on
December 13, 2001

BEFORE: THE HONORABLE PAUL G. MAUGHAN
Third District Court Judge

APPEARANCES:

For the State:

CARA TANGARO
District Attorney's Office
231 East 400 South
Suite 300
Salt Lake City, Utah 84111
Telephone: (801)363-7900

For the Defendant:

ANGEL BALDERRAMA
(Appeared pro se)

Transcribed by: Beverly Lowe CSR/CCT

1909 SOUTH WASHINGTON AVENUE
PROVO, UTAH 84606
TELEPHONE: (801)377-0027

20020786 CA

PROCEEDINGS

(Electronically recorded on December 13, 2001)

MR. BALDERRAMA: Your Honor, she doesn't have me on her calendar, so if you can call me.

THE COURT: What is your name?

MR. BALDERRAMA: Angel Balderrama.

MS. TANGARO: Do you have it on yours? We're ready on all three of them.

THE COURT: Okay.

MS. TANGARO: So I can call him first.

THE COURT: Balderrama.

MS. TANGARO: No. 5 on your calendar, I believe.

THE COURT: Sure. What will he be pleading?

MS. TANGARO: I think he just wanted to plead guilty.

MR. BALDERRAMA: No.

MS. TANGARO: Or plead not guilty, right?

MR. BALDERRAMA: Plead not guilty and get a public defender appointed to me. I'm not -- I work, but it's off and on with a temp agency. Also, all of the fines that I pay, so I couldn't *really afford them right now. The reason for a public* defender is I want to get the police reports and whatnot and see what was said. Pretty much going to try to fight it.

THE COURT: Okay. We'll appoint you a legal defender and set it for pretrial on February the 4th at 1:30.

MR. BALDERRAMA: Thank you.

THE COURT: Thank you. Actually, we could do this. We could do this one January 7th. Is there any reason you couldn't be here?

MR. BALDERRAMA: I have classes that day, (inaudible) treatment classes. I have them every other day, so I would have to look on the calendar and look and see -- what day is that? January 7th, what day?

THE COURT: It's a Monday.

MR. BALDERRAMA: (Inaudible) day would be better.

THE COURT: February 4th?

MR. BALDERRAMA: Yes, that will be fine, because I have my classes that end the end of January.

THE COURT: Okay.

(Hearing concluded.)

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF UTAH)

I, Beverly Lowe, a Notary Public in and for the State of Utah, do hereby certify:

That this proceeding was transcribed under my direction from the transmitter records made of these meetings.

That this transcript is full, true, correct, and contains all of the evidence and all matters to which the same related which were audible through said recording.

I further certify that I am not interested in the outcome thereof.

That certain parties were not identified in the record, and therefore, the name associated with the statement may not be the correct name as to the speaker.

WITNESS MY HAND AND SEAL this 26th day of December 2002.

My commission expires:
February 24, 2004

Beverly Lowe
NOTARY PUBLIC
Residing in Utah County