

1992

# State of Utah v. April Garza : Brief in Opposition to Certiorari

Utah Supreme Court

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R. Paul Van Dam; Attorney General; Judith S. H. Atherton; Assistant Attorney General; Attorneys for Respondent.

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## Recommended Citation

Legal Brief, *Utah v. Garza*, No. 920102.00 (Utah Supreme Court, 1992).  
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BRIEF

DOCKET NO. 920102

IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH,	:	
Plaintiff/Respondent,	:	Case No. 920102
v.	:	
APRIL GARZA,	:	Priority No. 13
Defendant/Petitioner.	:	

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI  
TO THE UTAH COURT OF APPEALS

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FILED

MAR 31 1992

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UTAH

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IN THE SUPREME COURT OF THE STATE OF UTAH

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI  
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ARGUMENT

Petitioner appears to present several questions in her petition. However, in her argument she only contests the court of appeals' conclusion that she did not provide an adequate record on review because she did not provide a transcript of the hearing on her motion to suppress. A brief review of the appellate chronology of this case will demonstrate that the court of appeals ruled correctly.

On August 3, 1990, petitioner timely filed a notice of appeal from her conviction of possession of equipment with intent to manufacture a controlled substance, a third degree felony, in violation of Utah Code Ann. § 58-37c-8(1)(b) (1990), and one count of conspiracy to manufacture methamphetamine, a third degree felony, in violation of Utah Code Ann. §§ 76-4-201 and 58-37-8 (1990) (R. 207).<sup>1</sup> On December 3, 1990, petitioner filed a

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<sup>1</sup> Petitioner apparently entered a conditional guilty plea to the two counts after the denial of her motion to suppress in accordance with State v. Sery, 758 P.2d 935 (Utah App. 1988).

certification that a trial transcript was not needed on appeal (R. 222). On or about December 4, 1990, petitioner filed her opening brief. The State filed its brief on February 13, 1991. The court of appeals received a transcript of the suppression hearing on March 1, 1991, two weeks after the State's brief was due and filed (see letter attached hereto in the Addendum).

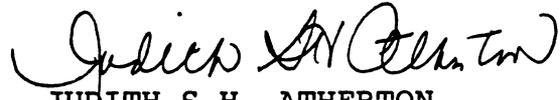
Petitioner never sought to produce a transcript of her guilty plea hearing. She produced a transcript of the suppression hearing after both petitioner's and the State's briefs had been filed. Therefore, neither petitioner nor the State were able to use the hearing transcript in briefing this case. Petitioner's assertion that the transcript had been properly presented to the court of appeals misstates the facts of this case and should be rejected (Petition at 2; see petition's exhibit "C"). The court of appeals properly found that petitioner had not provided the transcript for the purposes of this appeal. State v. Garza, 820 P.2d 937, 938 (Utah App. 1991). Therefore, the petition for a writ of certiorari should be denied.

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However, she did not produce a transcript of the guilty plea hearing, and the statement she signed prior to entering the plea did not fully comport with the conditional plea requirements of Sery. Therefore, the conditional plea could not be verified. The court of appeals noted that deficiency and reiterated the importance of providing a record to verify the entry of a conditional plea. State v. Garza, 820 P.2d 937, 938-9 (Utah App. 1991).

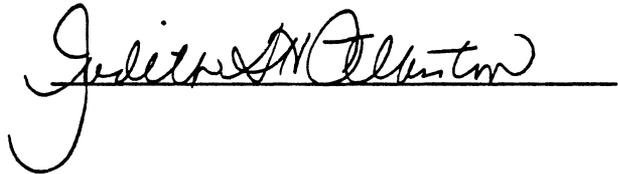
RESPECTFULLY SUBMITTED this 31 day of March, 1992.

R. PAUL VAN DAM  
Attorney General

  
JUDITH S.H. ATHERTON  
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, to Dean N. Zabriski, attorney for petitioner, 3507 N. University Ave., Jamestown Square, Suite 370, Provo, Utah, 84604, this 31 day of March, 1992.



## ADDENDUM

Russell W. Bench  
Presiding Judge

Judith M. Billings  
Associate Presiding Judge

Reginal W. Garff  
Judge

Pamela T. Greenwood  
Judge

Norman H. Jackson  
Judge

Gregory K. Orme  
Judge

Leonard H. Russon  
Judge

Dean N. Zabriskie  
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RECEIVED  
Utah Court of Appeals

MAR 4 1991

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OFFICE OF  
ATTORNEY GENERAL

March 4, 1991



Mary T. Noonan  
Clerk of the Court

In Re:

State of Utah,  
Plaintiff and Appellee,  
v.  
April Garza,  
Defendant and Appellant.

Case No. 900562-CA

Dear Mr. Zabriskie:

This letter is to advise you that on March 1, 1991, a supplemental record (transcript) on the aboved named appeal was filed in this court.

Sincerely,

Handwritten signature of Sheri Knighton in cursive.

Sheri Knighton  
Deputy Clerk

cc: R. Paul Van Dam  
Judith S.H. Atherton

## APPENDIX

member or organ; and her bodily injury did not create a substantial risk of death.

*Peterson*, 681 P.2d at 1218-19. The court affirmed his conviction, however, finding that the victim "suffered physical pain that is precisely the type of 'physical injury' contemplated by the statute." *Peterson*, 681 P.2d at 1219. See also *State v. Young*, 559 P.2d 541, 542 (Utah 1977) (requisite physical injury present where defendant's blow to victim's face momentarily stunned victim).

[3] Defendant attempts to distinguish *Peterson* and *Young* by contending that Mr. Carly sustained no bodily injury at all while he and Mr. Carly fought in the Carly home prior to the entrance of the other two assailants. The record does not support defendant's argument. Mr. Carly testified that after defendant struck him in the mouth with a closed fist, knocking him off balance, he could taste blood inside his mouth. Defendant continued to attack Mr. Carly with his fists such that Mr. Carly was forced to restrain defendant in a headlock. Moreover, Deputy Reed Parkin of the Salt Lake County Sheriff's Office, who investigated the disturbance at the Carly home, testified that Mr. Carly had sustained significant "trauma" to his face. According to Parkin, Mr. Carly's lips were swollen, and there was a pinkish color around his teeth, making it evident that he had been bleeding.<sup>15</sup>

Viewing the evidence in the light most favorable to the verdict, we conclude that a reasonable jury could have found, beyond a reasonable doubt, that defendant caused "bodily injury" to Mr. Carly as contemplated by the statute. Therefore, we affirm defendant's conviction for aggravated burglary.

15. Defendant contends that even if Mr. Carly's dizziness is a statutorily-recognized "bodily injury," he is not liable because another assailant caused the dizziness by pushing Mr. Carly against the kitchen sink. This argument is without merit. Utah Code Ann. § 76-6-203 (Supp. 1988) clearly provides that the injury may be perpetrated by "the actor or another participant in the crime." *Id.* Furthermore, Utah Code

## CONCLUSION

In sum, we affirm defendant's conviction for aggravated burglary. We hold that Mrs. Carly's courtroom behavior did not deny defendant a fair trial. Furthermore, there is sufficient evidence that defendant caused "bodily injury" to uphold his conviction of aggravated burglary under Utah Code Ann. § 76-6-203 (Supp.1988).

GREENWOOD and JACKSON, JJ.,  
concur.



STATE of Utah, Plaintiff and Appellee,

v.

April GARZA, Defendant and Appellant.

No. 900562-CA.

Court of Appeals of Utah.

Nov. 7, 1991.

Defendant entered plea after the Fourth District Court, Utah County, George E. Ballif, J., denied her motion to suppress certain evidence. Defendant appealed. The Court of Appeals, Jackson, J., held that Court would not review issue of propriety of denial of motion to suppress where defendant did not take issue with trial court's findings of fact and failed to provide transcript of hearing on motion to suppress.

Affirmed.

Orme, J., filed concurring opinion.

Ann. § 76-2-202 (1990) states: "Every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct."

**1. Criminal Law** ¶1144.12

Court of Appeals was to assume correctness of denial of motion to suppress where defendant did not take issue with trial court's findings of fact and failed to provide court with transcript of hearing; failure to provide transcript made it impossible to even verify that conditional plea, that would allow appeal, was even properly entered.

**2. Criminal Law** ¶1026.10(5)

Court of Appeals reviews rulings on preplea motions to suppress only when such plea, entered with consent of prosecution and accepted by trial judge, specifically preserves suppression issue for appeal, and Court of Appeals allows withdrawal of plea if defendant's arguments in favor of suppression are accepted.

**3. Criminal Law** ¶1119(2), 1130(3, 5)

Court of Appeal's decision not to consider merits of defendant's issues on appeal for failure to provide transcript of suppression hearing was bolstered by defendant's failure to include statement of facts in brief, as required by appellate rules, or to include citations to record in brief, which were grounds to refuse to reach issues. Rules App.Proc., Rule 24(a)(7).

Dean N. Zabriskie, Provo, for defendant and appellant.

R. Paul Van Dam and Judith S.H. Atherton, Salt Lake City, for plaintiff and appellee.

Before JACKSON, ORME and RUSSON, JJ.

JACKSON, Judge:

Defendant April Garza appeals from the trial court's denial of her motion to suppress certain evidence. We affirm.

Defendant asserts in conclusory terms that both the warrantless search of her vehicle and the warrant search of her residence violated her constitutional rights to be free from illegal searches and seizures.

[1] Defendant has not taken issue with the trial court's findings of fact and has

failed to provide this court with a transcript of the hearing on the motion to suppress, therefore, we must assume, as a matter of law, that the trial court's decision to deny that motion, was not erroneous. See *Jolivet v. Cook*, 784 P.2d 1148, 1150 (Utah 1989), cert. denied, 493 U.S. 1033, 110 S.Ct. 751, 107 L.Ed.2d 767 (1990) (court assumes regularity of proceedings below where appellant fails to provide adequate record on appeal) (citing *State v. Miller*, 718 P.2d 403, 405 (Utah 1986); *State v. Robbins*, 709 P.2d 771, 773 (Utah 1985); *State v. Jones*, 657 P.2d 1263, 1267 (Utah 1982)). See also *State v. Steggell*, 660 P.2d 252, 253 (Utah 1983) (court assumes correctness of judgment below if counsel on appeal fails to cite to record); *State v. Tucker*, 657 P.2d 755, 756 (Utah 1982) (court assumes correctness of findings when defendant's brief contained nothing more than defendant's version of facts found by trial court).

[2] While this may seem like a harsh result, we cannot review the proceedings below without an adequate record. Defendant's failure to provide us with a transcript makes it impossible for us, for example, even to verify that a conditional plea was properly entered, as defendant contends. In *State v. Sery*, 758 P.2d 935 (Utah App.1988), this court acknowledged that the use of conditional guilty pleas by criminal defendants was a sound and sensible practice, "if agreed to by the prosecution and accepted by the trial court." *Id.* at 938 (emphasis added). We review rulings on pre-plea motions to suppress only when such a plea "entered by the defendant with the consent of the prosecution and accepted by the trial judge specifically preserves the suppression issue for appeal and allows withdrawal of the plea if defendant's arguments in favor of suppression are accepted by the appellate court[.]" *Id.* In *State v. Bobo*, 803 P.2d 1268 (Utah App. 1990), this court stated that "[a] defendant seeking appellate review pursuant to a conditional plea bears the burden of demonstrating that the conditional nature of the plea is unambiguously established in the

trial court record." *Id.* at 1271 (citations omitted).

[3] In this case, because defendant has not supplied us with the requisite record, we do not review the denial of her motion to suppress. Our decision not to consider the merits of defendant's issues on appeal is further bolstered by the fact that she failed to include a statement of facts in her brief, as required by Rule 24(a)(7) of the Utah Rules of Appellate Procedure. Neither does defendant's brief contain any citations to the record. In *Demetropoulos v. Vreeken*, 754 P.2d 960, 965 (Utah App.) (Jackson, J., concurring), *cert. denied*, 765 P.2d 1278 (Utah 1988), the author of this opinion commented that "[t]he time will most assuredly arrive when a panel of this court will be constrained to disregard intolerable and unacceptable briefs and not reach the merits of the case." *Id.* In *English v. Standard Optical*, 814 P.2d 613, 618-19 (Utah App.1991), we overcame any trepidation that may have been present about declining to reach an issue and made clear that when an appellant's argument contains no citations to the record and no legal authority, and as such does not comply with briefing rules, we would decline to reach those issues.<sup>1</sup>

The trial court's denial of defendant's motion to suppress is affirmed.

RUSSON, J., concurs.

ORME, Judge (concurring):

I concur in the court's opinion. I write separately because this is a criminal case, and I believe in such cases we should be somewhat less fastidious in insisting upon compliance with technical requirements as a condition to reaching the merits. I would not be comfortable denying a criminal defendant any meaningful exercise of her constitutional right to an appeal merely because of superficial deficiencies in the brief prepared by her attorney.

1. See also Utah R.App P 24(a)(9) ("The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, with citations to the authorities, statutes, and parts of the record relied on"), *State v.*

That point having been made, I hasten to add this is not such an instance I found it impossible to glean from her brief what appellant's basic contentions are on appeal. Insofar as it is true that her complaint is about the legality of certain searches, where she takes no issue with the court's findings (something she could not, as a practical matter, do without a transcript) there is little we can do. If the findings were inadequate, we would remand for adequate findings. See, e.g., *State v. Lovegren*, 798 P.2d 767, 771 (Utah App.1990). If the findings supported only a legal conclusion that the searches, or one of them, was illegal, we would reverse. See, e.g., *State v. Elder*, 815 P.2d 1341 (Utah App. 1991). Neither scenario seems present here and nothing in appellant's brief serves to convince me otherwise.

One other point merits comment. The problems attending an inadequate brief can sometimes be ameliorated with a helpful presentation at oral argument. See, e.g., *Demetropoulos v. Vreeken*, 754 P.2d 960, 962 n. 6 (Utah App.1988), *cert. denied*, *Rone v. Demetropoulos*, 765 P.2d 1278 (Utah 1988). In this case, under circumstances which inspire little confidence, we had the benefit of oral argument only by counsel for the State. As counsel's cavalier attitude concerning this court's calendaring requirements is not unique, I want to take the occasion to point up the argument protocol the judges of this court expect. The protocol is premised on the notion that appellate argument is a rather significant event in the life of an attorney.

Upon receipt of notice of argument, counsel should immediately check his or her calendar. Existing conflicts should ordinarily give way to the scheduled argument. Attendance at the Court of Appeals is a sufficient excuse for changing most depositions and meetings. A narrow range of existing conflicts may warrant a change of time for the appellate argument as scheduled, at least if a partner or associate can not capably make the argument. A

*Day*, 815 P.2d 1345, 1352 (Utah App 1991); *Christensen v. Munns*, 812 P.2d 69, 72-73 (Utah App 1991), *Kouls v. Standard Oil Co. of Cal.*, 746 P.2d 1182, 1184-85 (Utah App 1987)

first place trial setting in a case that will not be settled, a long-planned vacation where non-refundable arrangements have been made, and scheduled medical or surgical procedures may be examples. However, to minimize disruption for opposing counsel as well as the court, a motion requesting a continuance and setting forth the problem in some detail should be filed within a few days of receipt of the notice—not within a few days prior to argument. Once argument has been set, one simply does not permit inconsistent obligations to come into existence thereafter. There are few reasons for avoiding the setting of depositions, trials, or hearings better than “I am scheduled at the Court of Appeals that morning.”

Unless a well-supported motion to continue has been filed within a few days of

receipt of our notice of argument, or argument is formally waived, we simply expect counsel to appear as scheduled unless an actual emergency, not reasonably to have been anticipated, arises and is brought to our attention as promptly as possible. If argument has not been previously waived as a matter of informed judgment, we assume the case merits argument, in which event it is simply unprofessional to just be a “no-show” even if a legitimate emergency has arisen.

