

2003

Utah v. James L. Robison : Brief of Appellee

Utah Court of Appeals

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Recommended Citation

Brief of Appellee, *Utah v. Robison*, No. 20030189 (Utah Court of Appeals, 2003).
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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

vs.

JAMES L. ROBISON,

Defendant/Appellant.

Case No. 20030189-CA

BRIEF OF APPELLEE

**APPEAL FROM A FINAL ORDER DENYING DEFENDANT'S MOTION
TO WITHDRAW HIS PLEA OF GUILTY TO ONE COUNT OF ISSUING
A BAD CHECK, A SECOND DEGREE FELONY, IN VIOLATION OF
UTAH CODE ANN. §76-6-505 (1999), IN THE FOURTH JUDICIAL
DISTRICT COURT, JUDGE DONALD EYRE PRESIDING**

FILED

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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vs.

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BRIEF OF APPELLEE

* * *

JURISDICTION AND NATURE OF PROCEEDINGS

Defendant appeals the district court's denial of his motion to withdraw his plea of guilty to one count of issuing a bad check, a second degree felony, in violation of Utah Code Ann. § 76-6-505 (1999), in the Fourth Judicial District Court, Juab County, Judge Donald Eyre presiding. This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(e) (2003).

ISSUE PRESENTED ON APPEAL AND STANDARD OF REVIEW

Did the district court strictly comply with rule 11?

Defendant appeals the district court's order denying his motion to withdraw his guilty plea. The district court's denial is reviewed for abuse of discretion. *See State v. Norris*, 2002 UT App 305, ¶ 6, 57 P.3d 238.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following statute and rule are relevant to this appeal:

Utah Code Ann. § 76-6-505 (1999), attached as **Addendum A**.

Rule 11, Utah Rules of Criminal Procedure, attached as **Addendum B**.

STATEMENT OF CASE AND FACTS

During the summer of 2001, defendant purchased a 2002 GMC ¾ ton truck from Painter Motors for \$40,812.00 (R. 7; 398:21). Defendant twice tried to pay for the truck by check, but each time the bank dishonored his check (R. 6-7; 398:21). Defendant never made good on the dishonored checks and did not return the truck to Painter Motors, but rather, sold it to another party (R. 6, 398:21).

The State charged defendant with two counts of issuing a bad check and one count of theft by deception (R. 110-11). Defendant and the State reached a plea agreement to one count of issuing a bad check (R. 242-247, 398). At the plea hearing, however, the parties disagreed as to whether defendant would plead guilty or no contest (R. 398:3-4). Defendant wanted to plead no contest to issuing a bad check (R. 398:3-4). The prosecutor said he would only accept a plea of guilty to issuing a bad check or a plea of no contest to theft by deception (R. 398:4). The court explained to defendant that there was no difference between a guilty plea and no contest plea, except for “some ramifications maybe for civil litigation” (R. 398:7-8). Defendant then decided to plead guilty to one count of issuing a bad check (R. 398:8).

The court asked defendant whether he had reviewed the written statement in advance of plea with his attorney (R. 398:8-9). Defendant replied that he had (R. 398:9). The court asked defendant if he had any questions about the statement (R. 398:9). Defendant asked a question about restitution, which the court, defense counsel, and the prosecutor all carefully answered (R. 398:9-12). The court then reviewed with defendant the constitutional rights he

would waive by pleading guilty including: the right to a speedy trial by an impartial jury, the right to require the State to prove guilt beyond reasonable doubt, the right to confront and cross-examine witness, the right to subpoena witnesses, the privilege against self-incrimination, and the right to appeal his conviction (R. 398:13-14). The court then explained the minimum and maximum sentence of one to fifteen years in prison and a \$10,000 fine (R. 398:14). Defendant asked a question about the minimum sentence and stated, “You have to understand Your Honor, I’ve not been in trouble before, I’m not familiar with this” (R. 398:14-16). The court carefully explained to defendant how sentencing worked and the roles of the Board of Pardons and Parole and Adult Probation and Parole (R. 398:14-16). Defendant conferred with his attorney off the record and then told the court that he understood the maximum penalty (R. 398:16-17).

The court noted that the State had agreed to drop the remaining charges and asked if there were any other terms to the agreement (R. 398:17). Defense counsel explained that the State had agreed not to oppose a post-probation motion to reduce the degree of the offense under Utah Code Ann. §76-3-402 and that the State had agreed to concur in the sentencing recommendation of Adult Parole and Probation (R. 398:17).

Defendant and the court then had the following exchange about whether defendant’s plea was free and voluntary:

JUDGE: Have there been any threats made against you that have induced you to enter this plea?

DEF: Well, I guess that comes . . . Well, . . .

JUDGE: What I want to know, is this plea your free voluntary act? That you're not acting under any undue coercion or, or force that this, that this is a, totally on the, totally your free and voluntary act.

DEF: Well, obviously there's a lot of, I mean, there's obviously a lot of coercion, Your Honor.

JUDGE: Well, I cannot accept your plea unless it's your free voluntary act, Mr. Robison.

DEF: I understand. Just give me a second. No, Your Honor.

JUDGE: Okay. So this is your free voluntary act?

DEF: I was answering no, that there was no coercion.

(R. 398:19) (alterations in original).

The court then asked defendant to sign the statement in advance of plea (R. 398:20). Defendant again stated that he was pleading guilty to one count of issuing a bad check (R. 398:20). The prosecutor provided a factual basis for the plea, stating that defendant had issued a check in exchange for something of value on an account that was closed (R. 398:20). Defendant objected and stated that the account was not closed (R. 398:20). The court and defendant then held the following exchange:

DEF: -- payment was not, was not honored by the bank but the account was not closed. I have a letter in my file from the institution stating that it was open.

JUDGE: Okay. You, you did issue a check which was not honored by your bank. Is that correct?

DEF: That's correct.

JUDGE: And a, upon notice of it not being honored did you, did you at any time make that check good?

DEF: I attempted to, Your Honor, and my bonding company also attempted to, but we were not able to completely do it.

JUDGE: Okay. And a, in exchange for that a car was delivered. Is that correct? A vehicle was—

DEF: No. The car was delivered several weeks prior to that.

JUDGE: Well, I mean—

DEF: There was a vehicle in, a transaction did involve a vehicle.

JUDGE: Yes. Okay. And that vehicle had a value in excess of \$5000?

DEF: It did, Your Honor.

JUDGE: The Court finds there's a factual basis, accepts your guilty plea, finds it was voluntarily and knowingly given with a full understanding of your constitutional rights.

(R. 398:20-21).

One month after the plea hearing, on November 15, 2002, defendant moved *pro se* to withdraw his guilty plea (R. 250-52). He claimed that the plea he entered at the hearing was “entirely different” from the earlier agreement he reached with the prosecutor (R. 251). He also claimed to have been confused, nervous, and unaware of the ramifications of the new arrangement (R. 251). On November 26, 2002, the court sentenced defendant to a suspended prison term of one-to-fifteen years and thirty-six months probation (R. 256-60). The court stayed execution of the sentence at defendant’s request, however, so that defendant could supplement his motion to withdraw (R. 256-60).

By February 7, 2003, defendant had filed no additional pleadings nor asked for any additional time on the stay, so the court filed a memorandum decision denying his motion to withdraw his plea (R. 273-75). The court found that the plea colloquy strictly complied with rule 11, Utah Rules of Criminal Procedure (R. 274-75). It also found that “[a]lthough there

was some initial confusion whether the defendant's plea was going to be a guilty plea or a no contest plea and the defendant had some questions concerning certain issues, . . . defendant entered his plea voluntarily, knowingly and with a full understanding of his constitutional rights" (R. 274). The court entered a final order denying the motion to withdraw on March 4, 2003, and defendant filed a timely notice of appeal the same day (R. 279-83).

SUMMARY OF ARGUMENT

A plea entered in strict compliance with rule 11, Utah Rules of Criminal Procedure, is presumed voluntary. Compliance with rule 11 must be evidenced on the record at the time the plea is entered, but a court may comply by using both oral colloquy and a written plea affidavit. If an affidavit is used, the court must find that defendant read and understood the affidavit and voluntarily signed it.

In the instant case, defendant signed a plea affidavit and the court determined on the record that defendant read and understood the affidavit. Considering the plea hearing and plea affidavit together, the court strictly complied with rule 11. Defendant's plea is therefore presumed knowing and voluntary. Defendant has not rebutted that presumption.

ARGUMENT

THE DISTRICT COURT STRICTLY COMPLIED WITH RULE 11; DEFENDANT'S PLEA IS THEREFORE PRESUMED KNOWING AND VOLUNTARY

Defendant claims that the district court failed to strictly comply with rule 11, Utah Rules of Criminal Procedure, and this Court should therefore permit him to withdraw his

guilty plea. Aplt.Br. at 5. Specifically, defendant asserts that (1) the district court failed to clearly explain the elements of the offense, (2) defendant never admitted committing the offense, (3) there was no clear factual basis for the plea, and (4) the written plea agreement was not clear or consistent and did not satisfy rule 11. Aplt. Br. at 6.

Defendant's claim is meritless.

A. Strict compliance with rule 11 creates a presumption that the plea was knowing and voluntary.

A guilty plea, like a confession, must be based on a knowing and voluntary waiver of certain constitutional rights. *See Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969). To ensure that “a defendant knows of his or her rights and thereby understands the consequences of a decision to plead guilty,” Utah adopted rule 11, Utah Rules of Criminal Procedure. *State v. Martinez*, 2001 UT 12, ¶ 22, 26 P.3d 203. Rule 11 “squarely places on the trial courts the burden of ensuring that constitutional and Rule 11(e) requirements are complied with when a guilty plea is entered.” *State v. Gibbons*, 740 P.2d 1309, 1312 (Utah 1987). “It is well established that ‘[s]trict compliance with rule 11(e) creates a presumption that the plea was voluntarily entered.’” *Martinez*, 2001 UT 12, ¶ 22 (alteration in original) (quoting *State v. Gamblin*, 2000 UT 44 ¶ 11, 1 P.3d 1108).

Strict compliance with rule 11 must be evident on the record at the time the guilty plea is entered. *See Gibbons*, 740 P.2d at 1313; *State v. Mora*, 2003 UT App 117, ¶ 19, 69 P.3d 838. “[S]trict compliance can be accomplished by multiple means so long as no requirement of the rule is omitted and so long as the record reflects that the requirement has been fulfilled.” *State v. Maguire*, 830 P.2d 216, 218 (Utah 1991). In other words, the plea-

taking court may rely on an oral colloquy with the defendant or on a plea affidavit. *Id.* at 218 (rejecting notion that trial court must base findings solely on oral colloquy). If an affidavit is used, however, the record must reflect that defendant understood and voluntarily signed the affidavit and that omissions or ambiguities in the affidavit were clarified during the plea colloquy. *See Mora*, 2003 UT App 117, ¶ 19.

B. The district court strictly complied with rule 11 by use of both a written affidavit and a plea colloquy.

At the plea hearing, the district court held an extensive oral colloquy with defendant (R. 398). The court also verified that defendant understood his written plea affidavit and voluntarily signed it (R. 398:8-9). This Court's review of defendant's plea may therefore include both the oral colloquy and the written affidavit. The colloquy and the affidavit demonstrate that the court strictly complied with rule 11.

1. Defendant understood the elements of issuing a bad check and that his plea was an admission of those elements.

Defendant asserts that the court never clearly explained the elements of the crime of issuing a bad check. Aplt. Br. at 6. Defendant also asserts that he "never did acknowledge, and has never acknowledged, his guilt with regard to the commission of the acts which were the elements of the charge to which he entered the guilty plea." Aplt. Br. at 9.

Rule 11(e)(4)(A) requires the court to verify that defendant understands the "nature and elements of the offense," that "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." A person commits the crime of issuing a bad check if he (1) issues a check for

the payment of money or the purpose of obtaining anything, (2) knows that the drawee will not pay the check, and (3) the drawee refuses to pay the check. *See* Utah Code Ann. § 76-6-505 (1999).

The plea affidavit contained the following statement of the elements of the crime of issuing a bad check: “That I, JAMES L. ROBISON, on or about September 11, 2001, in Juab County, State of Utah, did issue a check for the payment of money for the purpose of obtaining property knowing that it would not be paid by the drawee and payment was refused” (R. 246).

Defendant also knew that his guilty plea was an admission to those elements. There was some initial confusion as to whether defendant was admitting the elements of the crime or simply not contesting the facts set forth by the prosecution (R. 246; 398:3-8). During the plea colloquy, however, the trial court clarified with defendant that “[b]y entering a plea of guilty . . . you’re admitting you’re guilty of this particular crime” (R. 398:14).

2. The court found a factual basis for the plea.

Defendant asserts that “[t]here was no clear factual basis for the plea.” *Aplt. Br.* at 9. Rule 11(e)(4)(B), Utah Rules of Criminal Procedure, requires the court to find that “there is a factual basis for the plea.”

The plea affidavit contained the following fact statement to support the plea: “On or about September 11, 2001, in Juab County, State of Utah, I issued a check for the payment of money for the purpose of obtaining property knowing that it would not be paid by the drawee

and payment was refused” (R. 246). The prosecutor also provided a similar fact statement during the plea colloquy, but omitted the knowing element (R. 398:20).

Defendant nevertheless asserts that he “never did acknowledge, and has never acknowledged, his guilt with regard to the commission of the acts which were the elements of the charge to which he entered the guilty plea.” Aplt. Br. at 9. The record contradicts defendant’s claim. The plea affidavit contained a clear factual basis for the plea and a notice that by pleading guilty defendant did not dispute those facts (R. 246). The court also held the following discussion with defendant regarding the factual basis for the crime:

JUDGE: Okay. You, you did issue a check which was not honored by your bank. Is that correct?

DEF: That’s correct.

JUDGE: And a, upon notice of it not being honored did you, did you at any time make that check good?

DEF: I attempted to Your Honor, and my bonding company also attempted to, but we were not able to completely do it.

JUDGE: Okay. And a, in exchange for that a car was delivered. Is that correct? A vehicle was—

DEF: No. The car was delivered several weeks prior to that.

JUDGE: Well, I mean—

DEF: There was a vehicle in, a transaction did involve a vehicle.

JUDGE: Yes. Okay. And that vehicle had a value in excess of \$5,000?

DEF: It did, Your Honor.

JUDGE: The Court finds there's a factual basis, accepts your guilty plea, finds it was voluntarily and knowingly given with a full understanding of your constitutional rights. (R. 398:21).

While the court forgot to ask defendant about the knowing element of the crime, the plea affidavit informed defendant of the knowing element, and defendant told the trial court he had read and understood the plea affidavit (R. 246; 398:8-9).

3. Defendant understood the terms of the plea agreement.

Defendant claims that the written plea agreement was not clear or consistent and did not satisfy rule 11. Aplt. Br. at 6. He also asserts that "there was no meeting of the minds of what plea agreement had been reached." Aplt. Br. at 9.

Rule 11(e)(6) requires the court to determine what the terms of the plea agreement are. The court acknowledged that the State agreed to dismiss counts two and three. Defense counsel then gave a full, succinct explanation of the terms of the agreement:

Your Honor, there's an agreement between myself and the office of the county attorney that a, the state would not oppose a motion that I would file under 76-3-402 of the Utah Criminal Code to ask the Court to enter the ultimate offense as a third degree felony. And there's also a, an agreement that the prosecutor will simply concur in the sentencing recommendations of the Department of Adult Probation and Parole as opposed to maybe standing up and seeking to depart from what they may recommend.

(R. 398:17).

The plea affidavit also stated that defendant agreed to pay \$40,000 restitution (R. 244). This term was also explained to defendant during the plea colloquy (R. 398:9-12)

The only point of confusion was whether defendant would plead no contest or guilty (R. 398:3-8). That dispute, however, was resolved on the record at the start of the hearing

(R. 398:3-8). The court explained to defendant that there really is no difference between a guilty plea and a no contest plea except for “some ramifications maybe for civil litigation”

(R. 398:7-8). Defendant chose to plead guilty (R. 398:8).

CONCLUSION

For the foregoing reasons, the State respectfully requests the Court to affirm defendant’s conviction.

Respectfully submitted this 9th day of January 2004.

MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL

A handwritten signature in black ink, appearing to read 'Matthew D. Bates', with a long horizontal flourish extending to the right.

MATTHEW D. BATES
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of January 2004, I served two copies of the foregoing Brief of Appellee upon the defendant/appellant, James L. Robison, by causing them to be delivered by first class mail to Milton T. Harmon, his counsel of record, at 36 South Main Street, PO BOX 97, Nephi, Utah 84648

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

Matthew D. Bates
Assistant Attorney General

Addendum A

76-6-505. Issuing a bad check or draft — Presumption.

(1) Any person who issues or passes a check or draft for the payment of money, for the purpose of obtaining from any person, firm, partnership, or corporation, any money, property, or other thing of value or paying for any services, wages, salary, labor, or rent, knowing it will not be paid by the drawee and payment is refused by the drawee, is guilty of issuing a bad check or draft.

For purposes of this subsection, a person who issues a check or draft for which payment is refused by the drawee is presumed to know the check or draft would not be paid if he had no account with the drawee at the time of issue.

(2) Any person who issues or passes a check or draft for the payment of money, for the purpose of obtaining from any person, firm, partnership, or corporation, any money, property, or other thing of value or paying for any services, wages, salary, labor, or rent, payment of which check or draft is legally refused by the drawee, is guilty of issuing a bad check or draft if he fails to make good and actual payment to the payee in the amount of the refused check or draft within 14 days of his receiving actual notice of the check or draft's nonpayment.

(3) An offense of issuing a bad check or draft shall be punished as follows:

(a) If the check or draft or series of checks or drafts made or drawn in this state within a period not exceeding six months amounts to a sum that is less than \$300, the offense is a class B misdemeanor.

(b) If the check or draft or checks or drafts made or drawn in this state within a period not exceeding six months amounts to a sum that is or exceeds \$300 but is less than \$1,000, the offense is a class A misdemeanor.

(c) If the check or draft or checks or drafts made or drawn in this state within a period not exceeding six months amounts to a sum that is or exceeds \$1,000 but is less than \$5,000, the offense is a felony of the third degree.

(d) If the check or draft or checks or drafts made or drawn in this state within a period not exceeding six months amounts to a sum that is or exceeds \$5,000, the offense is a second degree felony.

Addendum B

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.

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

(e)(2) the plea is voluntarily made;

(e)(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;

(e)(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;

(e)(4)(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.

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

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

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

(e)(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 written statement reciting these factors after the court has established that the defendant has read, understood, and acknowledged the contents of the statement. If the defendant cannot understand the English language, it will be sufficient that the 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.

(g)(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.

(h)(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.

(h)(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; November 1, 2002.)