2004

Utah v. Ferguson : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellant, v. MICHAEL VON FERGUSON, Defendant/Appellee.	Case No. 20040077-CA

BRIEF OF APPELLANT

INTERLOCUTORY APPEAL FROM AN ORDER REDUCING A CHARGE OF VIOLATING A PROTECTIVE ORDER, IN VIOLATION OF UTAH CODE ANN. § 76-5-108 (1999), FROM A THIRD DEGREE FELONY TO A CLASS A MISDEMEANOR. IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, THE HONORABLE ROBIN W. REESE PRESIDING

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BRIEF OF APPELLANT

JURISDICTION AND NATURE OF THE PROCEEDINGS

This is an interlocutory appeal from an order reducing a charge of violating a protective order, in violation of Utah Code Ann. § 76-5-108 (1999), from a third degree felony to a class A misdemeanor, in the Third Judicial District Court, Salt Lake County, the Honorable Robin W. Reese presiding.

This Court has jurisdiction under Utah Code Ann. § 78-2a-3(2)(d) (2002).

ISSUES PRESENTED, STANDARDS OF REVIEW, AND PRESERVATION

1. *Shelton v. Alabama* holds that where an uncounseled guilty plea to a misdemeanor charge results in a suspended jail term, the jail term is invalid, but the conviction is valid. May this valid conviction be used to enhance a later charge?

2. Which party bears the burden of proof on the question of whether defendant knowingly and voluntarily waived his right to counsel in a prior plea proceeding?

Both issues raise questions of law reviewed for correctness. *See Hutchings v. State*, 2003 UT 52, ¶ 11, 84 P.3d 1150. Both are preserved. *See* R. 250-52, 287-88; R. 338: 3-7.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Central to the resolution of this case are Utah Code Ann. § 76-5-108 (1999) and Utah Code Ann. § 77-36-1.1 (2003):

76-5-108. Protective orders restraining abuse of another -- Violation.

(1) Any person who is the respondent or defendant subject to a protective order or ex parte protective order issued under Title 30, Chapter 6, Cohabitant Abuse Act, or Title 78, Chapter 3a, Juvenile Court Act of 1996, Title 77, Chapter 36, Cohabitant Abuse Procedures Act, or a foreign protective order as described in Section 30-6-12, who intentionally or knowingly violates that order after having been properly served, is guilty of a class A misdemeanor, except as a greater penalty may be provided in Title 77, Chapter 36, Cohabitant Abuse Procedures Act.

(2) Violation of an order as described in Subsection (1) is a domestic violence offense under Section 77-36-1 and subject to increased penalties in accordance with Section 77-36-1.1.

77-36-1.1. Enhancement of offense and penalty for subsequent domestic violence offenses.

(1) When an offender is convicted of any domestic violence offense in Utah, or is convicted in any other state, or in any district, possession, or territory of the United States, of an offense that would be a domestic violence offense under Utah law, and is within a five-year period after the conviction subsequently charged with a domestic violence offense that is a misdemeanor, the offense charged and the punishment for that subsequent offense may be enhanced by one degree above the offense and punishment otherwise provided in the statutes described in Section 77-36-1.

(2) For purposes of this section, a plea in abeyance is considered a conviction.

STATEMENT OF THE CASE

Defendant was charged by Amended Domestic Violence Information filed 11 April 2003 with four counts:

Count I	**Attempted murder**, a second degree felony, in violation of Utah Code Ann. § 76-5-203 (Supp. 2000);
Count II	**Burglary**, a second degree felony, in violation of Utah Code Ann. § 76-6-202 (Supp. 2001);
Count III	**Theft**, a second degree felony, in violation of 76-6-404 (1999);
Count IV	**Violation of a protective order**, enhanced to a three degree felony, in violation of 76-5-108 (1999).

R. 20-23. The magistrate bound defendant over on the charges of attempted murder and violation of a protective order, but dismissed the burglary and theft charges. R. 336: 88-89.

Defendant filed a motion to quash the bindover, arguing that "the State did not meet its burden of proof at the preliminary hearing of presenting sufficient evidence to establish probable cause that Mr. Ferguson committed the crime of violation of a protective order, a third degree felony." R. 33-41. The trial court ruled that the State had met its burden of "showing probable cause regarding the Violation of a Protective Order charge." R. 287 (addendum A). However, it struck the enhancement. R. 288 (addendum A). The State sought, and this Court granted, leave to appeal this interlocutory order. R. 329.

STATEMENT OF FACTS[1]

The victim obtains a protective order against defendant

Defendant lived with Julia Jepson for twenty years. R. 336: 28. During this time, he mentally, physically, and verbally abused her. R. 336: 29. He would drive her to her work at Brickyard Kennel in Salt Lake City, because she "wasn't allowed her to drive [her] car." R. 336: 36. When she occasionally went out back of the building, "he'd be sitting out there in a car, watching." R. 336: 36-37. Although she needed medical attention for her injuries more than once, she didn't report the abuse to police until 5 January 2003. R. 336: 29-30.

According to a Verified Petition for Protective Order filed 7 January 2003, on 5 January 2003 defendant cut Jepson's telephone line, cracked the windshield on her car, and shattered her sliding glass door. R. 230-31. Defendant threatened Jepson's life; when she tried to leave, he threatened to cut her dog's throat. R. 231. Jepson called the police, but defendant fled before they arrived. R. 231. He later returned, kicked in the side glass door, and made more threats on Jepson's life. R. 231. She called police and defendant again fled, but was later arrested. R. 231; R. 336: 30.

Jepson spent that night at her work and her daughter spent the night with other people. R. 231. Defendant spent six days in jail. R. R. 336: 31. The first day, he left 28 messages on Jepson's answering machine. R. 336: 30. About seven of them were threatening,

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[1] The facts are taken from allegations in the preliminary hearing and exhibits. Defendant has not been proven guilty beyond a reasonable doubt of the charged offenses.

"basically along the lines of, when he gets out, he's going to get even, it doesn't matter how long it takes." R. 336: 31. These messages remained on Jepson's answering machine until 17 March 2003, when her house was broken into and the messages erased. R. 336: 47.

A protective order was entered 8 January 2003 prohibiting defendant from contacting or harassing Jepson or going near her place of employment. R. 210-12.

After defendant's release from jail, his sister called Jepson, but when Jepson took the call, defendant was on the line. R. 336: 48. She told him, "this is against the protection order, I want nothing to do with [you], to leave me alone." R. 336: 49. The conversation ended "with a lot of begging to let him come back," but Jepson refused. R. 336: 49.

The protective order was finalized 21 January 2003. R. 221. It provided, "Respondent is ordered to stay away from the school, place of employment, and/or other places, and their premises, frequented by Petitioner, the minor children, and the designated household and family members." R. 222. The order listed the address of Jepson's place of employment, Brickyard Kennel. R. 222. It restrained defendant "from attempting, committing, or threatening to commit abuse or domestic violence against Petitioner." R. 221.

Defendant pleads guilty to violation of the protective order

On 18 March 2003, defendant pled guilty to violating the protective order, a class A misdemeanor. R. 109-11. He was sentenced to one year in jail, but the time was suspended and he was placed on probation. R. 110-11. Court documents show he was not represented by counsel. R. 109-13 (addendum B).

Defendant violates the protective order a second time

Six days later, Salt Lake City Police Officer Sullivan was flagged down by two people who reported seeing a man with a rifle on the roof of Media Play. R. 336: 8-9. Media Play is located behind Brickyard Kennel, where Jepson worked. R. 336: 35-36.

As the officer approached Media Play, he saw defendant on the roof. R. 336: 9-10. When Officer Sullivan asked why he was on the roof, defendant replied that he was repairing the rain gutter. R. 336: 11. Officer Sullivan went inside the store and spoke with a manager, who informed him that no maintenance was scheduled for the roof. R. 336: 11-12.

By the time Officer Sullivan left Media Play, defendant was gone. R. 336: 12. When Officer Sullivan climbed onto the roof, he found a rifle wrapped in a jacket. *Id.* The rifle was loaded; one round was chambered. R. 336: 13.

Around noon, Jepson went outside to walk her dog, but when she noticed helicopters, news crews, and police cars in the Brickyard area, she checked the television to see what was going on. R. 336: 42. The reporter said a sniper was on the roof of Media Play, and gave a description resembling defendant. R. 336: 42. Jepson called police, who told her to contact an officer on the scene. R. 336: 42-43. In the course of a two-and-a-half-hour interview with police, Jepson identified the jacket found on the roof as defendant's. R. 336: 44.

Defendant's interview

Homicide detective Allen DeGraw interviewed defendant at the University Hospital, where defendant was taken after a suicide attempt. R. 336: 52-53. At first defendant said

he did not want to talk to police, but then began telling the detective how upset he was about "what his wife was doing to his daughter." R. 336: 69.

After waiving his Miranda rights, defendant admitted that he had been on the roof of Media Play on the day in question, that he had a rifle with him on the roof, that he had it because when he locked his bike he had no way of securing the rifle, that he knew he should not have been in the area, and that he had already been in trouble for violating the protective order. R. 336: 54-56. He said he was on the roof looking for "tools and things that people might leave on the roof." R. 336: 55. He left the rifle on the roof. R. 336: 59.

SUMMARY OF ARGUMENT

The trial court's order striking the enhancement on the charge of violating a protective order charge should be reversed for two independent reasons. First, even if defendant was denied his right to counsel when he pled guilty, the resulting misdemeanor conviction (though not his suspended jail sentence) is valid under controlling Supreme Court precedent and thus available to enhance a subsequent charge.

Second, the trial court was in any event required to presume defendant's prior misdemeanor conviction was valid. By placing on the State the burden to establish that defendant had knowingly and voluntarily waived counsel, the trial court in effect reversed the presumption. The burden is properly defendant's.

ARGUMENT

This appeal poses two issues. Both relate to the State's reliance on a prior misdemeanor conviction to enhance defendant's current charge from a class A misdemeanor to a third degree felony. *See* Utah Code Ann. § 77-36-1.1 (1999). The prior conviction was entered pursuant to a guilty plea. R. 110. Although the charged crime was a misdemeanor, because defendant received a suspended jail sentence, he had the right to counsel at the plea hearing. A defendant may knowingly and voluntarily waive counsel. Although court documents show that defendant was unrepresented, they do not show whether he knowingly and voluntarily waived counsel. *See* R. 109-113 (addendum B). So far the parties agree.

They part company on two points, both questions of law. First, irrespective of whether defendant knowingly and voluntarily waived counsel at the plea hearing, may the resulting conviction enhance his current charge under controlling United States Supreme Court precedent? And second, if not, who bears the burden of proving whether defendant knowingly and voluntarily waived counsel?

I.
A PRIOR UNCOUNSELED GUILTY PLEA MAY ENHANCE A SUBSEQUENT CHARGE BECAUSE, UNDER *SHELTON V. ALABAMA*, A PRIOR CONVICTION IS VALID, ALTHOUGH THE RESULTING SUSPENDED TERM OF INCARCERATION IS NOT

Under controlling United States Supreme Court precedent, defendant's prior misdemeanor conviction may be used to enhance his current charge, even if he was denied his Sixth Amendment right to counsel in the prior proceeding.

Defendant is charged with violation of a protective order. R. 20-23. A person subject to a protective order "who intentionally or knowingly violates that order after having been properly served, is guilty of a class A misdemeanor . . ." Utah Code Ann. § 76-5-108(1) (1999). However, if the offense is committed within five years of a prior domestic violence conviction, the offense may be enhanced to a third degree felony. Utah Code Ann. § 77-36-1.1(1) (2003). Defendant fits this category. However, his prior conviction was entered pursuant to a guilty plea at which defendant was unrepresented by counsel. R. 109-11 (addendum B). He was sentenced to a suspended jail term. *Id.*

The trial court ruled that under *Alabama v. Shelton*, 535 U.S. 654 (2002), because defendant's prior uncounseled misdemeanor conviction resulted in a suspended sentence, it "cannot be used to enhance count II unless the State presents evidence that the defendant knowingly and voluntarily waived his right to counsel." R. 287-88 (addendum A). The court rejected "the State's argument that *Shelton* only invalidates the jail sentence given pursuant to an uncounseled misdemeanor conviction, and does not impact the conviction itself." R. 288 (addendum A). The trial court misread *Shelton*.

Shelton is the third in a trio of United States Supreme Court cases addressing the dimensions of the Sixth Amendment right to counsel when a defendant is charged with a misdemeanor. Despite the plain language of the Sixth Amendment ("In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defence"), defendants facing misdemeanor charges do not all enjoy the right to counsel. A defendant

charged with a misdemeanor is entitled to counsel if the sentence ultimately imposed includes incarceration, even if jail time is suspended.

Argersinger v. Hamlin, 407 U.S. 25 (1972), 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 his trial." *Id.* at 37. In *Scott v. Illinois*, 440 U.S. 367 (1979), the Supreme Court reaffirmed that "actual imprisonment" triggered the right to counsel in misdemeanor cases. *Id.* at 373. (Scott had no right to counsel because his sentence included a $50 fine, but no jail time; hence, his conviction was affirmed. *Id.* at 368-69, 373.)

Shelton involved an unrepresented defendant who did not duly waive counsel. 535 U.S. at 657. He was not imprisoned, but received a suspended jail sentence. *Id.* at 658. The Court held that a suspended sentence is indistinguishable from an imposed sentence for purposes of the right to counsel, since Shelton would be unable to challenge the original judgment at any later probation revocation hearing. *Id.* at 667. He was thus denied the right to counsel. *Id.* at 674.[2]

However, the Court did not reverse Shelton's conviction. It affirmed the order of the Alabama Supreme Court, which invalidated Shelton's suspended jail sentence, but affirmed his conviction. *Id.* at 659, 674. Thus, the Supreme Court affirmed Shelton's conviction. *See*

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[2] This decision effectively overruled *Layton City v. Longcrier*, 943 P.2d 655 (Utah App. 1997).

United States v. Ortega, 94 F.3d 764, 769 (2nd Cir. 1996) ("The appropriate remedy for a *Scott* violation . . . is vacatur of the invalid portion of the sentence, and not reversal of the conviction itself.").[3]

Shelton thus stands for the proposition that, where a defendant charged with a misdemeanor is not represented and does not duly waive counsel, his conviction and any portion of the sentence not involving incarceration are valid, but any imposed or suspended jail time is invalid. The conclusion is logical: had the sentencing court imposed no jail time, the defendant would not have been entitled to counsel and his conviction and sentence would have been valid; hence, vacating the jail time relieves an uncounseled defendant of that portion of his sentence upon which his right to counsel hung.

Nichols v. United States, 511 U.S. 738 (1994), issued after *Scott* but before *Shelton*, is the leading case on using prior misdemeanor convictions to enhance later charges. It holds "that an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction." *Id.* at 749 (overruling *Baldasar v. Illinois*, 446 U.S. 222 (1980)). The Court reasoned that enhancement statutes "do not change the penalty imposed for the earlier conviction," but penalize only the subsequent offense. *Id.* at 747. The rule of *Nichols* is, then, that an

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[3] A contrary rule obtains in felony cases: a conviction obtained in violation of a defendant's Sixth Amendment right to counsel may not be used in a subsequent proceeding either to support guilt or to enhance punishment. *Burgett v. Texas*, 389 U.S. 109, 115 (1967). *Accord State v. Triptow*, 770 P.2d 146, 147 (Utah 1989) (citing *Burgett*); *State v. Branch*, 743 P.2d 1187, 1192 (Utah 1987) (citing *Burgett*).

otherwise valid misdemeanor conviction is also valid for purposes of enhancing a later conviction.[4]

In sum, under *Shelton* a misdemeanor conviction imposed in violation of a defendant's right to counsel is valid (although any jail time is not); under *Nichols* an otherwise valid misdemeanor conviction is valid to enhance a subsequent charge. Thus, a misdemeanor conviction imposed in violation of a defendant's right to counsel is nevertheless valid to enhance a subsequent charge.[5]

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[4] *Nichols* also states that Nichols's "uncounseled misdemeanor conviction [was] valid under *Scott* because no prison term was imposed." 511 U.S. at 749. This statement seems to imply that, had a prison term been imposed, Nichols's uncounseled misdemeanor conviction would not have been valid. However, any such implication was overruled sub silentio eight years later when the Court affirmed Shelton's conviction after holding his right to counsel had been violated.

[5] The United States Solicitor General made this very argument in *Iowa v. Tovar*, 124 S. Ct. 1379 (2004). Tovar's third drunk driving conviction was enhanced from a misdemeanor to a felony based on two prior misdemeanor convictions. *Id.* at 1385. Tovar argued that his first conviction was invalid because the judge did not "elaborate on the right to representation" before accepting his waiver of counsel. *Id.* at 1383. The Supreme Court rejected the argument, holding that "the constitutional requirement is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea." *Id.*

The United States, as *amicus curiae*, proposed an alternative ground for affirmance. *Id.* at 1387, n.10. Citing *United States v. Ortega*, it argued that "a constitutionally defective waiver of counsel in a misdemeanor prosecution, although warranting vacation of any term of imprisonment, affords no ground for disturbing the underlying conviction." *Id.* Thus, an uncounseled misdemeanor conviction may be used to enhance the penalty for a subsequent offense "regardless of the validity of the prior waiver." *Id.* However, because the State of Iowa did "not contest the Iowa Supreme Court's determination that a conviction obtained without an effective waiver of counsel cannot be used to enhance a subsequent charge," the Supreme Court did not reach this issue. *Id.*

So here, even if defendant's misdemeanor conviction was obtained in violation of his right to counsel, it remains valid under *Shelton* and thus available under *Nichols* to enhance his current charge. The trial court's contrary conclusion is incorrect as a matter of law.

II.
DEFENDANT BEARS THE BURDEN OF PROVING HE DID NOT KNOWINGLY AND VOLUNTARILY WAIVE HIS RIGHT TO COUNSEL IN THE PRIOR PLEA PROCEEDING

Where the State relies on a prior conviction to enhance a pending charge, it bears the burden of proving the prior conviction, which is then entitled to a presumption of regularity. This presumption imposes on defendant the burden of proving that he was uncounseled in the prior proceeding and that he did not knowingly and voluntarily waive counsel.

The trial court misplaced this burden. In quashing the enhancement on the charge of violation of a protective order, it ruled that, even after the State has proven the prior conviction, the burden remains on the State to "present[] evidence that the defendant knowingly and voluntarily waived his right to counsel." R. 288 (addendum A).

State v. Triptow, 770 P.2d 146 (1989), controls. Convicted of second degree felony theft, Triptow was sentenced as a habitual criminal based on his two prior felony convictions. *Id.* at 146-47. Triptow argued that, "before evidence of a prior conviction can be admitted, the State has the burden of showing not only that the conviction occurred, but also that the defendant had counsel at the time of the previous guilt determination." *Id.* at 147.

The court rejected Triptow's challenge to his prior convictions. It held that a judgment of conviction "is entitled to a presumption of regularity, including a presumption that the

defendant was represented by counsel. This presumption satisfies any initial burden the State may have of proving that the defendant had *or knowingly waived counsel.*" *Id.* at 149 (emphasis added). The burden then shifts to defendant: "After proof of the previous conviction is introduced, the burden is on the defendant to raise the issue and produce some evidence that he or she was not represented by counsel *and did not knowingly waive counsel.*" *Id.* (emphasis added).[6]

Here, proof of defendant's prior misdemeanor conviction satisfied any initial burden the State had to prove defendant was either represented by or, in this case, knowingly waived counsel. The burden then shifted to defendant to produce some evidence that he "did not knowingly waive counsel" in his prior plea proceedings. *Id.*

This approach is consistent with *Parke v. Raley*, 506 U.S. 20 (1992). Raley was charged under the Kentucky persistent felony offender statute, which provided mandatory minimum sentences for repeat felons. *Id.* at 22. The prosecution introduced copies of Raley's 1979 and 1981 judgments of conviction for burglary, both of which were based on guilty pleas. *Id.* at 24. Raley challenged both prior convictions on the ground that his guilty pleas were not knowingly and voluntarily entered. *Id.* at 22 (citing *Boykin v. Alabama*, 395 U.S. 238 (1969)). The record of the 1979 guilty plea indicated that defendant was represented and that his counsel explained to him his rights. *Id.* at 24. However, the record

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[6] In *State v. Gutierrez*, 2003 UT App 95, 68 P.3d 1035, this Court addressed the quality of proof necessary to rebut a conviction's presumption of regularity. *See id.* at ¶ 11.

of the 1981 plea showed only that the judge had advised Raley of his right to a jury trial. *Id.* at 24-25. It did not show that he was represented or that he had knowingly and voluntarily waived his right to counsel. On federal habeas review the United States Court of Appeals for the Sixth Circuit reversed with respect to the 1981 guilty plea. *Id.* at 25.

The Supreme Court upheld the conviction, holding that "Kentucky's burden-shifting rule easily passes constitutional muster." *Id.* at 28. The Court noted at the outset that Raley had "never appealed his earlier convictions. They became final years ago, and he now seeks to revisit the question of their validity in a separate recidivism proceeding." *Id.* at 29. The Court also acknowledged the "presumption of regularity," which, it observed, is "deeply rooted in our jurisprudence." *Id.* The Court found "no good reason to suspend the presumption of regularity here," since this was not a case where "an extant transcript is suspiciously 'silent' on the question whether the defendant waived constitutional rights": "[e]vidently, no transcripts or other records of the earlier plea colloquies exist at all." *Id.* at 30. "Our precedents make clear," the Court concluded, "that even when a collateral attack on a final conviction rests on constitutional grounds, the presumption of regularity that attaches to final judgments makes it appropriate to assign a proof burden to the defendant." *Id.* at 31. This is so notwithstanding "serious practical difficulties will confront any party assigned an evidentiary burden in such circumstances." *Id.* at 31-32.

The *Parke* Court readily distinguished *Burgett v. Texas*, 389 U.S. 109 (1967). *Burgett* had addressed the validity of a prior uncounseled conviction. Seeing "no indication in the

record that counsel had been waived," the Court there held that "[p]resuming waiver of counsel from a silent record is impermissible." *Id.* at 112, 114-15. However, the *Parke* Court noted that at the time of Burgett's plea, "state criminal defendants' federal constitutional right to counsel had not yet been recognized, and so it was reasonable to presume that the defendant had not waived a right he did not possess." *Parke*, 506 U.S. at 31. In contrast, at the time of Raley's plea, the *Boykin* requirements *were* well established, so it was reasonable to presume that Raley *had* waived those rights. *Id.* Read together, then, *Burgett* and *Parke* stand for the rather routine proposition that plea-taking courts are presumed to comply with all legal requirements in existence at the time of the plea, but not those imposed later.

The trial court here reversed this presumption. Defendant's right to counsel was established at the time of his guilty plea. Defendant pled guilty 18 March 2003. R. 109-11 (addendum B). Because he received a suspended sentence, he enjoyed the right to counsel under *Alabama v. Shelton*, which had been decided the previous year, on 20 May 2002. *Parke* and *Triptow* thus required the trial court to presume that the court accepting defendant's guilty plea had complied with *Shelton*. Instead, it required the State to produce additional evidence that the plea court had complied with *Shelton*. In effect, the trial court presumed that the court taking the prior plea had violated the law. That was error under *Triptow* and *Parke*.

CONCLUSION

The order of the trial court striking the enhancement to the charge of violation of a protective order should be reversed and the matter remanded for further proceedings.

RESPECTFULLY submitted on 22 June 2004.

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CERTIFICATE OF SERVICE

I hereby certify that four copies of the foregoing brief of appellant were this 22 June 2004 hand-delivered to an agent for the following:

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Addendum A

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, -vs- MICHAEL VON FERGUSON, Defendant.	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER Case No. 031902097 Judge ROBIN W. REESE

The Defendant's Motion to Quash the Bindover having come before this Court for hearing in the above entitled matter on October 24th, 2003, and November 3rd, 2003, in which Defendant was represented by counsel, Vernice Trease, and the State was represented by counsel, B. Kent Morgan and Alicia H. Cook, the Court having fully considered the written memoranda and oral arguments of counsel, this Court now enters its FINDINGS OF FACT and CONCLUSIONS OF LAW and ORDER.

FINDINGS OF FACT

1. On March 18th, 2003, the defendant pled guilty to violating a protective order, a class A misdemeanor, before Judge Medley in District Court case number 031901111, and was sentenced to 365 days in jail. The defendant was not

represented by counsel when he entered his plea. The jail sentence was suspended in its entirety and the defendant was placed on probation.

2. On March 26th, 2003, the State filed an information alleging that the defendant had committed Attempted Homicide, Violation of a Protective Order, Burglary, and Theft of a Firearm. The protective order violation was enhanced to a third degree felony based on the defendant's prior conviction in case number 031901111.

3. A preliminary hearing was held on August 26th, 2003, before Judge Iwasaki. The State presented evidence that the defendant, while carrying a loaded rifle, had climbed onto the roof of a building neighboring the victim's workplace. The State also offered a certified copy of the prior conviction to support the enhanced protective order violation. Defense counsel objected to the use of the prior conviction, and argued that an uncounseled plea could not be used to enhance a subsequent offense. The Court overruled the objection and at the conclusion of the hearing found sufficient probable cause to bind over the Attempted Homicide and Protective Order Violation charges.

4. On October 16th, 2003, counsel for the defense filed a Motion to Quash the Bindover. The defense argued that the defendant's prior uncounseled misdemeanor conviction could not be used to enhance the subsequent offense, and urged the Court to strike the enhancement. The defense also argued that the evidence presented at the preliminary hearing failed to establish that the defendant had actually violated the protective order.

5. This Court heard oral arguments on October 24th, 2003. At the conclusion of the arguments, the Court requested that counsel brief the application of Alabama v. Shelton to the instant case, and scheduled further arguments for November 3rd, 2003.
6. During the November 3rd hearing, counsel for the State argued that Shelton prohibits the imposition of a suspended jail sentence given to a misdemeanor defendant who did not have counsel, but does not invalidate the underlying conviction for purposes of enhancing future crimes. Counsel for the defendant argued that, whenever a suspended jail sentence is given to a misdemeanor defendant, Shelton does not permit the use of that conviction for enhancement.

CONCLUSIONS OF LAW

1. The defense's motion to quash the bindover for insufficient evidence is denied. The State met its burden at the preliminary hearing of showing probable cause regarding the Violation of a Protective Order charge. The defendant's efforts to commit homicide against the victim also constitute a violation of the protective order, which prohibits the defendant from committing or attempting to commit acts of violence against the victim.
2. The defense's motion to quash the bindover of count II as a third degree felony is granted. The Court agrees with the defense that under Alabama v.Shelton, a defendant facing a misdemeanor charge is entitled to counsel when a jail sentence is rendered, regardless of whether the sentence is suspended or actually imposed. Defendant Ferguson did not have counsel at the time he entered his guilty plea

and received a suspended sentence, therefore the prior conviction cannot be used to enhance count II unless the State presents evidence that the defendant knowingly and voluntarily waived his right to counsel. The Court disagrees with the State's argument that Shelton only invalidates the jail sentence given pursuant to an uncounselled misdemeanor conviction, and does not impact the conviction itself.

ORDER

IT IS HEREBY ORDERED that the enhancement to count II is stricken, and count II stands as a class A misdemeanor.

DATED this 21 day of January, 2004.

BY THE COURT:

Judge ROBIN W. REESE

Approved as to form:

Vernice Trease

Addendum B

[redacted]

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

FILED DISTRICT COURT
Third Judicial District
MAR 26 2003
SALT LAKE COUNTY
Deputy Clerk

SENTENCE/JUDGMENT/COMMITMENT/ORDER
Criminal/Traffic

CITY/STATE Plaintiff

-VS-

Defendant

DOB: 2/3/50

Interpreter

CHARGES

Case Number 031501111

Tape Number ______ C # ______

Date 3/18/03 Time 900

Judge/Comm

Clerk

Plaintiff Counsel

Defense Counsel

Amended

Amended

THE COURT SENTENCED THE DEFENDANT AS FOLLOWS:

(1) Jail 365 d Suspended

Defendant to Commence Serving Jail Sentence

(2) Fine Amt. $ 310 Susp. $ ______ Fee $ ______ Fine Bal $ 310

TOTAL FINE(S) DUE $ 310

Payment Schedule: Pay $ ______ per month/1st Pmt. Due ______ Last Pmt. Due ______

(3) Court Costs $ ______

(4) Community Service/WP ______ through ______ 7/1/03

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

Attorney Fees $ ______

(6) Probation 24 Months ☒ Good Behavior ☐ AP&P ☐ ACEC ☐ Other

(7) **Terms of probation:**

☒ No Further Violations ☐ Counseling thru

☐ AA Meetings ______ / wk ______ / month ☐ Classes

☐ Follow Program ☐ In/Out Treatment

☐ No Alcohol ☐ Health Testing

☐ Antibuse ☐ Crime Lab Procedure

☐ Employment ☒

☒ Proof of 4/14/03 ☐

(8) Plea in Abeyance Diversion

(9) Review __ / __ / __ at 3/18/03

I CERTIFY THAT THIS IS A TRUE COPY OF AN ORIGINAL DOCUMENT ON FILE IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH.
DATE:
DEPUTY COURT CLERK

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

District Court Judge

STAMP USED AT DIRECTION OF JUDGE

APPEAL MUST BE FILED WITHIN 30 DAYS OF JUDGMENT
INTEREST WILL BE ADDED IF FINE AND/OR RESTITUTION NOT PAID IN FULL TODAY

3RD DISTRICT COURT - SALT LAKE COURT
SALT LAKE COUNTY, STATE OF UTAH

SOUTH SALT LAKE, Plaintiff,	:	MINUTES CHANGE OF PLEA SENTENCE, JUDGMENT, COMMITMENT
vs.	:	Case No: 031901111 MO
MICHAEL FERGUSON, Defendant.	:	Judge: TYRONE E MEDLEY Date: March 18, 2003

PRESENT
Clerk: tinaa
Prosecutor: FROST, JANICE L
Defendant
Defendant pro se

DEFENDANT INFORMATION
Date of birth: February 3, 1955
Video
Tape Number: 9.21

CHARGES

1. VIOLATION OF PROTECTIVE ORDER - Class A Misdemeanor
Plea: Guilty - Disposition: 03/18/2003 (Guilty Plea)

CHANGE OF PLEA

SENTENCE JAIL

Based on the defendant's conviction of VIOLATION OF PROTECTIVE ORDER a Class A Misdemeanor, the defendant is sentenced to a term of 365 day(s) The total time suspended for this charge is 365 day(s).

Credit is granted for time served.

Case No: 031901111
Date: Mar 18, 2003

PROBATION CONDITIONS

Violate no laws.

Defendant is not to commit any other violations. Complete LDS substance abuse program by 4/14/03. Fine to be paid by 7/1/03.

Dated this 18 day of March, 2003.

Tyrone E. Medley

TYRONE E MEDLEY
District Court Judge

By _____

STAMP USED AT DIRECTION OF STATE

I CERTIFY THAT THIS IS A TRUE COPY OF AN ORIGINAL DOCUMENT ON FILE IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH,
DATE: 3/18/03

DEPUTY COURT CLERK

STATE OF UTAH THIRD DISTRICT COURT

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

SOUTH SALT LAKE vs. MICHAEL VON FERGUSON

CASE NUMBER 031901111 Other Misdemeanor

CHARGES
Charge 1 - 76-5-108 - VIOLATION OF PROTECTIVE ORDER
Class A Misdemeanor Plea: March 18, 2003 Guilty
Disposition: March 18, 2003 (Guilty Plea)

CURRENT ASSIGNED JUDGE
WILLIAM W. BARRETT

PARTIES

Defendant - MICHAEL VON FERGUSON
SALT LAKE CITY, UT 84115

Plaintiff - SOUTH SALT LAKE

DEFENDANT INFORMATION

Defendant Name: MICHAEL VON FERGUSON
Offense tracking number: 13818737
Date of Birth: February 03, 1955
Jail Booking Number:
Law Enforcement Agency: SO SALT LAKE POLICE
LEA Case Number:
Prosecuting Agency: SOUTH SALT LAKE CITY
Agency Case Number:
Sheriff Office Number: 61883
Violation Date: January 21, 2003 6 EAST CORDELLA AVE
This case involves domestic violence.

ACCOUNT SUMMARY

TOTAL REVENUE	Amount Due:	350.00
	Amount Paid:	0.00
	Credit:	0.00
	Balance:	350.00

REVENUE DETAIL - TYPE: FINE

Amount Due:	350.00
Amount Paid:	0.00
Amount Credit:	0.00
Balance:	350.00

PROCEEDINGS

Printed: 03/24/03 16:20:42 Page 1
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CASE NUMBER 031901111 Other Misdemeanor

02-13-03 Case filed by barbarrs barbarrs
02-19-03 ARRAIGNMENT scheduled on March 18, 2003 at 09:00 AM in Arraignment - S31 with Judge ARRAIGNMENT. barbarrs
02-19-03 Judge ARRAIGNMENT assigned. barbarrs
02-19-03 Note: SUMMONS SENT TO SOUTH SALT LAKE FOR SERVICE barbarrs
03-18-03 Minute Entry - Minutes for Change of Plea tinaa
Judge: TYRONE E MEDLEY
PRESENT
Clerk: tinaa
Prosecutor: FROST, JANICE L
Defendant
Defendant pro se

Video
Tape Number: 9.21

CHANGE OF PLEA

SENTENCE JAIL

Based on the defendant's conviction of VIOLATION OF PROTECTIVE ORDER a Class A Misdemeanor, the defendant is sentenced to a term of 365 day(s) The total time suspended for this charge is 365 day(s).

Credit is granted for time served.
PROBATION CONDITIONS

Violate no laws.

Defendant is not to commit any other violations. Complete LDS substance abuse program by 4/14/03. Fine to be paid by 7/1/03.
03-18-03 Fine Account created Total Due: 350.00 tinaa
03-18-03 Note: CHANGE OF PLEA minutes modified. tinaa
03-18-03 Filed: DEFENDANT'S SIGNED WAIVER OF COUNSEL joannelb
03-18-03 Filed order: SIGNED SENTENCE/JUDGMENT/COMMITMENT/ORDER joannelb
Judge tmedley
Signed March 18, 2003
03-20-03 Judge BARRETT assigned. joannelb