

1992

# Utah v. James C. Quada : Brief of Appellee

Utah Court of Appeals

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BRIEF

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, :  
Plaintiff/Appellee, : Case No. 920778-CA  
v. :  
JAMES C. QUADA, : Priority No. 2  
Defendant/Appellant. :

BRIEF OF APPELLEE

APPEAL FROM CONVICTIONS OF EVADING, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 41-6-13.5 (1988), AND RESISTING ARREST, A CLASS B MISDEMEANOR, IN VIOLATION OF UTAH CODE ANN. § 76-8-305 (SUPP. 1991), IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY, STATE OF UTAH, THE HONORABLE BOYD L. PARK, PRESIDING.

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**FILED**  
Utah Court of Appeals

SEP 27 1993

  
Mary T. Noonan  
Clerk of the Court

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IN THE UTAH COURT OF APPEALS

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THE STATE OF UTAH, :  
Plaintiff/Appellee, : Case No. 920778-CA  
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BRIEF OF APPELLEE

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IN THE UTAH COURT OF APPEALS

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THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 920778-CA
v.	:	
JAMES C. QUADA,	:	Priority No. 2
Defendant/Appellant.	:	

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BRIEF OF APPELLEE

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JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from judgments and convictions by a jury of evading, a third degree felony, in violation of Utah Code Ann. § 74-6-13.5 (1988); and resisting arrest, a class B misdemeanor, in violation of Utah Code Ann. § 76-8-305 (Supp. 1991). Addendum A.

This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1993).

STATEMENT OF ISSUES PRESENTED ON APPEAL  
AND STANDARDS OF APPELLATE REVIEW

1. Was the length and scope of the detention unlawful? This Court need not reach the merits of this issue because it was not preserved below, exceptions to the waiver doctrine are not argued on appeal, defense counsel's brief does not conform with rule 24, Utah Rules of Appellate Procedure, and defendant's pro se brief is not useful to this Court's consideration of the issue. Hence, no standard of review applies.

2. Did Deputy Pickup violate defendant's fourth amendment rights by stopping him for a speeding violation? There

is no standard of review applicable to this issue as this Court need not reach the merits for the reasons provided in issue number 1, supra.

3(a). Was defendant denied effective assistance of trial counsel due to counsel's failure to raise five substantive issues at trial? This Court need not reach this issue as the threshold requirements have not been met for raising it for the first time on direct appeal. Alternatively, this Court must determine whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced defendant under the test set forth in State v. Frame, 723 P.2d 401, 405 (Utah 1986).

(b). Has defendant been denied effective assistance of either trial or appellate counsel due to a conflict of interest? When a defendant raises a conflict of interest for the first time on appeal, this Court must determine whether an actual conflict exists which adversely affect counsel's performance. See State v. Webb, 790 P.2d 65, 73 (Utah App. 1990) (quoting Cuyler v. Sullivan, 446 U.S. 335, 348 (1980)); see also State v. Johnson, 823 P.2d 484, 488 (Utah App. 1991).

4. Was defendant deprived of a constitutional right to a twelve-person jury? Because this issue is not properly before this Court, there is no applicable standard of review.

5. Did either defendant's arrest or the subsequent impound of his vehicle constitute an unlawful bill of attainder? As with previous issues, there is no applicable standard of review as the issue is not properly before this Court.

6. Was the jury properly instructed concerning their duty to follow the law? This issue was waived, and no standard of review is applicable on appeal. However, should this Court reach the merits of this issue, it will reverse based on an improper jury instruction only where defendant demonstrates prejudice stemming from the instructions viewed in the aggregate. State v. Haston, 811 P.2d 929, 931 (Utah App. 1991), rev'd. on other grounds, 846 P.2d 1276 (Utah 1993); State v. McCumber, 622 P.2d 353, 359 (Utah 1980), abrogated on other grounds, State v. Ramirez, 817 P.2d 774 (Utah 1991). The precise wording and specificity contained in an instruction is left to the trial court's sound discretion, so long as the instruction does not misstate material rules of law. State v. Sherard, 818 P.2d 554, 560 (Utah App. 1991), cert. denied, 843 P.2d 516 (Utah 1992).

#### CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The text of any relevant constitutional, statutory, or rule provisions pertinent to the resolution of the issues presented on appeal is contained either in the body or the appendix of this brief.

#### STATEMENT OF THE CASE

Defendant James C. Quada was charged by information with aggravated assault, a third degree felony, in violation of Utah Code Ann. § 76-5-103 (1990); evading, a third degree felony, in violation of Utah Code Ann. § 41-6-13.5 (1988); and resisting arrest, a class B misdemeanor, in violation of Utah Code Ann. § 76-8-305 (Supp. 1991) (R. 1-2). At trial, the court granted

defendant's motion to dismiss the charge of aggravated assault based on the State's failure to establish a prima facie case (R. 84). The jury found defendant guilty on the remaining two charges (R. 80-81).

Defendant refused to report to AP&P for preparation of the presentence report (R. 82-83, 89-90). The court received an abbreviated report, then sentenced defendant to serve an indeterminate term not to exceed five years in the Utah State Prison for the evading conviction, and six months in the Utah County Jail for resisting arrest (R. 92-93).

Defendant timely filed an appeal, seeking reversal of his convictions. Defense counsel filed an appellate brief, after which this Court permitted defendant to file a supplemental pro se brief.

#### STATEMENT OF FACTS

During the evening of February 5, 1992, Deputy John Pickup was running traffic radar on county road 8170 North, west of American Fork, Utah (Trial Transcript [hereinafter "Tr."] 126-28). Deputy Pickup was driving westbound in a 40 mile-per-hour zone shortly before 10:00 p.m. when he noticed a solitary 1974 Pinto station wagon driving toward him at a speed he estimated to be 55 miles per hour (Tr. 126, 128, 130, 135, 150, 163, 237). His radar clocked the car at 53 miles per hour (Tr. 164). The deputy turned his car around, activated his lights and siren, and pulled the Pinto to the side of the road (Tr. 130, 135-36, 207-08, 226).

Deputy Pickup approached the driver's window, intending to explain to the driver that animals and children frequently use the road and that he should slow down (Tr. 131, 163-64). The deputy requested that the driver produce a driver's license and vehicle registration (Tr. 137, 208). Defendant, the sole occupant of the Pinto, opened only the top few inches of the window and passed the documents to the deputy (Tr. 135, 137, 207-08, 226). The deputy return to his car and relayed the license information to dispatch pursuant to department policy to verify the license and to check for outstanding warrants (Tr. 132, 139). Dispatch notified him that the computer showed an outstanding arrest warrant for defendant out of Lehi County (Tr. 140, 165). As required by department policy, dispatch then contacted Officer James Munson of the Lehi County Sheriff's Office to request that he personally verify the validity of the warrant (Tr. 132-33, 140, 165, 234). After he verified the warrant as valid, Officer Munson drove to the location where Deputy Pickup had stopped defendant (Tr. 165, 234-35).

Once Deputy Pickup was informed of the warrant's validity, he was required by department policy to enforce the warrant (Tr. 189). When Officer Munson arrived, Deputy Pickup again approached defendant's car, explained that a warrant had been issued for his arrest, and requested that defendant get out of the car (Tr. 141-43, 166, 208-09, 236-37, 250). Defendant refused (Tr. 144-45, 208, 226). After several ineffective requests and a warning that he would use force if necessary, the

deputy returned to his car to get his "slim jim" in order to open the locked car doors (Tr. 144-45, 167-68, 238).<sup>1</sup> At the same time, Officer Munson, who had originally positioned himself on the passenger side of the Pinto, moved to the front of the car near the fender on the driver's side (Tr. 142, 145, 228, 236-37, 239). Defendant started his car and began to move onto the roadway (Tr. 168-69, 209, 228, 239-40). Officer Munson backed away from the moving car and yelled to Deputy Pickup that defendant was leaving (Tr. 146-47, 170). He also motioned to defendant to stop, telling him that he was under arrest and could not leave (Tr. 147, 240). Defendant continued toward Officer Munson as the officer backed away into the eastbound lane of the road until the officer was finally forced to leap over the front fender of defendant's car to avoid being hit (Tr. 148-49, 171-74, 190-91, 240). Defendant accelerated away from the scene (Tr. 149, 228-29, 241).

Deputy Pickup jumped in his car and followed defendant, with Officer Munson behind him, the lights and sirens of both police vehicles fully activated (Tr. 149-50, 154-55, 192, 217, 242). Defendant led the officers approximately one mile east where he turned onto another county road toward American Fork (Tr. 151a, 211, 242). Deputy Pickup used his radar to determine that defendant reached 50 miles per hour before he turned off

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<sup>1</sup> The deputy described his "slim jim" as a thin metal device, approximately eighteen inches long, which slides inside a car door through the crack where the window retracts and enables an officer to unlock the door from the outside (Tr. 167-68).

county road 8170 North (Tr. 151-52, 158). The second county road had a posted speed of 25 miles per hour and took the trio down the main street of American Fork (Tr. 155-56, 176). According to Deputy Pickup's radar, defendant reached slightly over 50 miles per hour, swerving around the slower traffic in front of him and around parked cars, and causing a number of cars to stop suddenly or to swerve (Tr. 153-56, 245).

Defendant ultimately turned off of the main street and into a residential area, braking sharply before the turn (Tr. 156-57). According to the deputy's radar, defendant accelerated to 60 miles per hour (Tr. 156-58, 183-84, 186, 218, 244). At this point, two American Fork sheriff's vehicles joined the chase (Tr. 244, 252). After a couple of blocks, defendant again braked sharply and turned, stopping in front of a house less than a block from the turn (Tr. 157-58, 187, 218-19). All four police vehicles pulled up around defendant's vehicle with their lights and sirens activated (Tr. 158-59, 246-47, 254). Deputy Pickup spoke to defendant through the closed window on the driver's side of the Pinto, asking him to step out of the car and explaining that he was under arrest for the warrant as well as for evading arrest, failing to stop on the officers' command, and assault with his vehicle (Tr. 159). Defendant did not roll down the windows and kept his hands on the door locks (Tr. 159, 220, 231, 247). Deputy Pickup tried to open the back of the Pinto, but found the door locked. He returned to his truck for his "slim jim" but was unable to use it because defendant kept his hands on

the locks (Tr. 159-60, 247). The deputy again informed defendant that he was under arrest and that if he did not get out of the car, the officer would break a window to remove him (Tr. 160, 247). When defendant refused to respond, the officer used a special device to break a window farthest away from defendant in order to minimize the potential for injuries (Tr. 160-61, 221, 247-48). The officers unlocked and opened the doors, and defendant stepped from the car (Tr. 161, 248, 254). He was handcuffed and placed him in the back of Deputy Pickup's car (Tr. 161, 248). Officer Munson produced a hard copy of the Lehi warrant, showed it to defendant, then gave it to Deputy Pickup (Tr. 248-49, 255). Because defendant was not the registered owner of the Pinto, the car was impounded (Tr. 137-38, 162).

#### SUMMARY OF THE ARGUMENT

This Court should not consider points 1 through 5 in defense counsel's brief because, of the six issues presented in the brief, counsel identifies these points as frivolous. Further, the entire brief fails to comply with rule 24, Utah Rules of Appellate Procedure, because it contains no factual statement, no record citation, and little or no relevant legal analysis. This Court should also disregard defendant's pro se brief because it contains emotional, immaterial, and inadequate arguments useless to this Court's determination of the disposition of the case.

#### Points I (scope of detention) and II (basis for stop):

This Court should not reach the merits of these two points for



the additional reasons that they were not raised below, no exception to the waiver doctrine is presented on appeal, and the arguments contain no record citations or meaningful legal analysis.

Point III (ineffective assistance of trial and appellate counsel): Defendant's claim of ineffective assistance of trial counsel should not be reviewed because he fails to meet the threshold requirements for raising the issue for the first time on appeal. Moreover, defendant fails to establish either counsel's deficient performance or any resulting prejudice. Finally, defendant does not establish the actual conflict necessary to prevail on his conflict of interest allegation against both trial and appellate counsel.

Point IV (12-person jury): This issue was not preserved below, and counsel's argument lacks record citation, legal analysis, and supporting authority in violation of rule 24. Alternatively, defendant's trial by a jury of less than twelve people is permitted under the Utah Constitution and complies with the United States Supreme Court's interpretation of the federal constitution in Williams v. Florida, 399 U.S. 78 (1970).

Point V (impoundment as unlawful bill of attainder): Defendant failed to raise this issue below, and he provides no record citation or meaningful legal analysis on appeal. Moreover, a ruling on the issue will not affect defendant's conviction or entitle him to the reversal he seeks.

Point VI (jury instruction): Trial counsel did not challenge any jury instructions below, and the appellate argument does not comply with rule 24. Further, the challenged instruction accurately stated the jury's duty to follow the law as stated by the court, and its use does not constitute error.

#### ARGUMENT

#### INTRODUCTION

Defendant's counsel has filed a brief containing six issues, five of which defense counsel admits are without merit and one which he claims is meritorious. Brief of Appellant's Counsel [hereinafter "Appellant's Brief I"] at 8-9. Such a bifurcated approach to briefing has been explicitly rejected by this Court. Butterfield v. Cook, 817 P.2d 333, 341 (Utah App.), cert. denied, 826 P.2d 651 (Utah 1991). Allowing meritless issues to be brought on appeal "would demonstrate a lack of confidence in the appellate bar's ability to distinguish between frivolous and nonfrivolous issues." Id. In addition, it would unnecessarily increase the workload of both court and counsel by encouraging criminal appellants to present meritless issues alongside those with obvious merit. Id. As the meritless claims should not have been brought before this Court in the first place, they should not be considered on appeal.

Moreover, defendant's entire brief fails to meet the requirements of rule 24, Utah Rules of Appellate Procedure. The brief includes no factual statement, and counsel fails to cite to the record throughout the entire brief. Utah R. App. P. 24(a)(7)

and (9), and 24(e). Additionally, the "Statement of Issues" includes no recitation of the appropriate standards of review and supporting authority citation for each issue, and the text of the brief includes only the standard applicable to the claim of ineffective assistance of counsel. Utah R. App. P. 24(a)(5). Hence, this Court should assume the correctness of the judgment below. Christensen v. Munns, 812 P.2d 69, 72-73 (Utah App. 1991) (no record citations, legal authority, analysis, or standard of review and supporting authority); State v. Hoyt, 806 P.2d 204, 208-09 (Utah App. 1991) (no legal analysis or citation to supporting authorities); State v. Ortiz, 782 P.2d 959, 962 (Utah App. 1989) (merits not reached absent citations to the record), cert. denied, 795 P.2d 1138 (Utah 1990); Koulis v. Standard Oil Co., 746 P.2d 1182, 1184-85 (Utah App. 1987) (no concise statement of facts, citation to the record, or documented argument); see also State v. Wareham, 772 P.2d 960, 966 (Utah 1989) (no legal analysis or authority to support the analysis); State v. Tucker, 657 P.2d 755 (Utah 1982) (no statement of facts and citation to record).

Additional reasons for refusing to reach the merits of defendant's various claims are set out in the arguments, infra.

Defendant has filed a pro se brief in addition to his counsel's brief [hereinafter "Appellant's Brief II"]. The brief raises numerous claims of error, two of which are included in the discussions found at Points IV and VI, infra. Even taking into account the general allowance granted pro se litigants, see

Winter v. Northwest Pipeline Corp., 820 P.2d 916, 918-19 (Utah 1991) (recognizing that a pro se litigant is not held to presenting his arguments with the precision of an attorney, but also cannot expect the Court to become his advocate), the remaining arguments should be disregarded as they are either factually insupportable in that they are contrary to the record evidence or otherwise lack any evidentiary or record support or citation; are legally insupportable as reversible error in that, even if error was committed, defendant has failed to establish that any errors would have substantially affected the outcome of his case; are devoid of supporting legal analysis; or are wholly immaterial, emotional, and inaccurate, neither assisting this Court in disposing of the case nor setting forth any appropriate, concise challenge as required under rule 24(k). Koulis, 746 P.2d at 1184-85; see also State v. Knight, 734 P.2d 913, 920 (Utah 1987); State v. Cabututan, 213 Utah Adv. Rep. 18, 22 (Utah App. 1993) (refusing to address several issues regarding prejudice on the part of the jury, the court, and the justice system based on defendant's failure to provide any legal analysis). Accordingly, this Court should disregard defendant's pro se brief and assume the correctness of the decision below. See Koulis, 746 P.2d at 1184-85.

### POINT I

THIS COURT NEED NOT REACH THE MERITS OF DEFENDANT'S SCOPE OF DETENTION CLAIM BECAUSE DEFENSE COUNSEL CONCEDES ITS LACK OF MERIT, THE ISSUE WAS NOT RAISED BELOW, DEFENDANT ARGUES NEITHER PLAIN ERROR NOR EXCEPTIONAL CIRCUMSTANCES, AND THE ARGUMENT CONTAINS NO RECORD CITATIONS OR MEANINGFUL LEGAL ANALYSIS

In two sentences and one case cite, defendant argues that the length and scope of his detention exceeded legally permissible bounds. Appellant's Brief I at 4. He defines the detention as extending from the initial traffic stop on county road 8170 to his ultimate arrest in American Fork and implies that the detention was unlawful because it exceeded the length necessary to dispose of the speeding violation. Id.

In addition to the deficiencies in the briefs addressed in the Introduction, supra, this Court need not reach the merits of this issue because defendant failed to raise it below and makes no effort on appeal to establish either plain error or exceptional circumstances.<sup>2</sup> State v. Sepulveda, 842 P.2d 913, 917-18 (Utah App. 1992); State v. Webb, 790 P.2d 65, 77 (Utah App. 1990) (the Court will generally "not consider an issue, even a constitutional one, which the appellant raises on appeal for the first time."). Further, the argument contains no record citations and no meaningful legal analysis. See Utah R. App. P. 24(a)(7) and (9); see also State v. Price, 827 P.2d 247, 248-50

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<sup>2</sup> Defendant's ineffective assistance claim for failure to raise the issue below is addressed at Point III, infra.

(Utah App. 1992); Hoyt, 806 P.2d at 208-09; Ortiz, 782 P.2d at 962.

## POINT II

THIS COURT NEED NOT ADDRESS DEFENDANT'S CHALLENGE TO THE LEGALITY OF THE STOP FOR THE ADDITIONAL REASONS THAT THE CLAIM WAS NOT RAISED BELOW, NEITHER PLAIN ERROR NOR EXCEPTIONAL CIRCUMSTANCES ARE PRESENTED ON APPEAL, DEFENDANT MISSTATES THE EVIDENCE, AND THE ARGUMENT LACKS CITATION TO THE RECORD OR RELEVANT LEGAL ANALYSIS

Defendant contends that the initial stop of his car violated the Fourth Amendment because he was unreasonably stopped for traveling 43 miles per hour in a 40 mile-per-hour zone.<sup>3</sup> Appellant's Brief I at 4-5.

As with Point I, supra, this issue was not preserved below, and defendant asserts neither plain error nor exceptional circumstances.<sup>4</sup> Sepulveda, 842 P.2d at 917-18; State v. Robinson, 797 P.2d 431, 435 (Utah App. 1990) (declining to consider the constitutionality of the traffic stop because the issue was raised for the first time on appeal). Deputy Pickup expressly testified that his radar clocked defendant at 53 miles

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<sup>3</sup> Defendant's argument nominally references the state constitution, but he presents no independent state constitutional analysis or citation. Hence, this Court should not reach the state constitutional challenge. State v. Dudley, 847 P.2d 424, 426 (Utah App. 1993); State v. Burk, 839 P.2d 880, 883 n.1 (Utah App. 1992), cert. denied, 853 P.2d 897 (Utah 1993); State v. Adams, 830 P.2d 310, 312 (Utah App.), cert. denied, 843 P.2d 1042 (Utah 1992); State v. Severance, 828 P.2d 1066, 1068 (Utah App. 1992); State v. Boone, 820 P.2d 930, 932 n.2 (Utah App. 1991).

<sup>4</sup> See Point III, infra, for defendant's assertion of ineffective assistance for counsel's failure to raise the issue below.

per hour in a 40 mile-per-hour zone, and that any earlier reference to 43 miles per hour was wholly inaccurate (Tr. 163-64). Defendant's argument misstates these facts, fails to cite to the record, and provides no legal analysis concerning the reasonableness of the initial stop. Utah R. App. P. 24(a)(7) and (9). Accordingly, the merits of the claim should not be reached. Christensen, 812 P.2d at 72-73; Hoyt, 806 P.2d at 208-09; Ortiz, 782 P.2d at 962.

### POINT III

THIS COURT SHOULD NOT ADDRESS THE INEFFECTIVE COUNSEL CLAIM FOR THE FIRST TIME ON APPEAL WHERE DEFENDANT'S APPELLATE COUNSEL WAS COUNSEL OF RECORD BELOW; SHOULD THIS COURT REACHES THE ISSUE, IT WILL FIND THAT DEFENDANT HAS FAILED TO MEET HIS BURDEN OF ESTABLISHING BOTH DEFICIENT PERFORMANCE AND PREJUDICE

Defendant raises for the first time on appeal claims of ineffective assistance against both his trial and his appellate counsel. Appellant's Brief I at 5.

A claim of ineffective assistance of trial counsel can be raised for the first time on appeal when the record is adequate to permit determination of the issue and there is new counsel on appeal.<sup>5</sup> State v. Schnoor, 845 P.2d 947, 950 (Utah App. 1993); State v. Johnson, 823 P.2d 484, 487 (Utah App. 1991). Defendant's appellate counsel was counsel of record below (R. 31,

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<sup>5</sup> Defendant himself untimely raised an ineffective assistance argument at trial after both sides had rested their respective cases (Tr. 264). The court refused to hear the issue at the time (id.). The claim, involving an alleged conflict of interest, is addressed at the end of Point III, infra.

105). Addendum B. Hence, this Court should not entertain defendant's claims of ineffective trial counsel for the first time in his direct appeal.

However, as defendant has filed a pro se brief on appeal and has alleged ineffective assistance, this Court may choose to reach his ineffectiveness claims. Even so, the Court will find that defendant fails to meet his burden of establishing ineffective assistance.

To establish a claim of ineffective assistance of counsel, defendant must first show that his counsel rendered deficient performance in a demonstrable manner. State v. Verde, 770 P.2d 116, 118-19 (Utah 1989). He must establish that the performance fell below the objective standard of a reasonable professional and must adduce sufficient evidence to overcome the presumption that counsel rendered adequate assistance and exercised reasonable professional judgment. Butterfield, 817 P.2d at 336. Second, he must establish that a reasonable probability exists that absent counsel's deficient performance, the result would have been different. Id.; see Verde, 770 P.2d at 118-19. The deficient performance must be so prejudicial as to undermine confidence in the reliability of the verdict. Butterfield, 817 P.2d at 336; see Verde, 770 P.2d at 124 n.15. Failure to establish either prong will defeat the entire claim. State v. Oliver, 820 P.2d 474, 478 (Utah App. 1991), cert. denied, 843 P.2d 516 (Utah 1992); see Verde, 770 P.2d at 118-19.



In this case, defendant fails to meet either prong in making his ineffectiveness claim against his trial counsel. While acknowledging the appropriate legal standard, defendant does not conduct the required analysis. He identifies as deficient performance the failure to raise any of the remaining five substantive errors included in defendant's brief on appeal. Appellant's Brief I at 5. He also contends that counsel failed to spend adequate time with him. Appellant's Brief II at 5, 11-12. However, he does not explain how the alleged omissions fell below an objective standard of reasonableness. Butterfield, 817 P.2d at 336. Similarly, he makes no attempt, either in this claim or in the separate substantive arguments, to demonstrate any reasonable probability that either inclusion of any of the five substantive issues below or an increase in the time spent with his counsel would have resulted in a different outcome at trial. Id. Accordingly, his claim must fail. Id.

Defendant also asserts a conflict of interest against both his appellate and his trial counsel. Appellant's Brief I at 5; Appellant's Brief II at 8. The conflict allegedly arises because counsel's efforts on defendant's behalf are funded through the county by means of a contract with the public defenders office.

A conflict of interest claim is analyzed under a different standard than other ineffectiveness claims. When a defendant raises a conflict of interest for the first time on appeal, he must demonstrate with specificity that "an actual

conflict of interest exist[s] which adversely affect[s] his. . . lawyer's performance.'" See Webb, 790 P.2d at 73 (quoting Cuyler v. Sullivan, 446 U.S. 335, 348 (1980)); see also Johnson, 823 P.2d at 488. When such a showing is made, prejudice will be presumed. Johnson, 823 P.2d at 488.

Defendant establishes no actual conflict, relying instead on a novel assertion of an inherent conflict. He offers no support for this assertion and no alternative by which to satisfy his continued demand for counsel without involving this inherent "conflict." Accordingly, he has not established that either appellate or trial counsel is ineffective.

#### POINT IV

IN ADDITION TO DEFENSE COUNSEL'S CONCESSION THAT THE ISSUE INVOLVING A 12-PERSON JURY IS MERITLESS, THIS COURT MAY REFUSE TO ADDRESS THE MERITS OF THE ISSUE BECAUSE IT WAS NOT PRESERVED BELOW, NO EXCEPTION TO THE WAIVER DOCTRINE IS ADVANCED ON APPEAL, AND NO SUPPORTING RECORD CITATION OR LEGAL ANALYSIS AND SUPPORTING AUTHORITY IS PROVIDED; ALTERNATIVELY, DEFENDANT RECEIVED THE "TRIAL BY JURY" TO WHICH HE IS CONSTITUTIONALLY ENTITLED

Defendant argues that his trial by an eight-person jury instead of a twelve-man jury harboring beliefs similar to his deprived him of his sixth amendment right to "trial by jury". Appellant's Brief I at 6; Appellant's Brief II at 2, 14-18.

In addition to the briefing deficiencies outlined in the Introduction, supra, this Court need not reach this issue because it was not raised below, and defendant fails to argue

either plain error or exceptional circumstances.<sup>6</sup> Sepulveda, 842 P.2d at 917-18; Robinson, 797 P.2d at 435. Additionally, the argument contains no citation to the record and no legal analysis or authority supporting the claim, in violation of rule 24(a)(7) and (9), Utah Rules of Appellate Procedure. Hoyt, 806 P.2d at 208-09; Ortiz, 782 P.2d at 962; Koulis, 746 P.2d at 1184-85; see also Wareham, 772 P.2d at 966.

Defendant's pro se brief includes a detailed argument on this issue. Appellant's Brief II at 14-18. In view of the leniency afforded pro se defendants on appeal, see Winter, 820 P.2d at 919-20, this Court may choose to reach the merits of the issue. Therefore, the State briefly addresses the claim.

As defendant recognizes, at common law a jury was required to be comprised of twelve men. Appellant's Brief II at 14-15. However, the United States Supreme Court has determined that the Federal Constitution does not codify the common law requirement of a 12-person jury. Williams v. Florida, 399 U.S. 78, 86-103 (1970). To the contrary, it has held that "the 12-man panel is not a necessary ingredient of 'trial by jury,'" and that a jury by fewer than twelve, when provided for by state law, does not violate the Sixth Amendment. Id., 399 U.S. at 86. In this case, defendant was tried before an eight-person jury, as provided for by article I, section 10 of the Utah Constitution. Accordingly, he received the "trial by jury" to which the federal

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<sup>6</sup> His claim of trial counsel's ineffectiveness in failing to preserve the issue is addressed in Point III, supra.

constitution entitles him, and his argument must fail. Id. Moreover, his state constitutional right to a jury trial was fulfilled as well. See State v. Nuttall, 611 P.2d 722, 724 (Utah 1980) (affirming a misdemeanor conviction before a jury of less than twelve pursuant to article I, section 10 of the Utah Constitution).

#### POINT V

DEFENDANT'S CLAIM THAT IMPOUNDMENT OF HIS VEHICLE CONSTITUTES AN UNLAWFUL BILL OF ATTAINDER IS NOT PROPERLY BEFORE THIS COURT BECAUSE IT WAS NOT RAISED BELOW, NO EXCEPTION TO THE WAIVER DOCTRINE IS URGED ON APPEAL, AND NO RECORD CITATION OR SUPPORTING LEGAL ANALYSIS APPEARS IN THE BRIEF; ADDITIONALLY, A RULING ON THIS ISSUE WILL NOT AFFECT DEFENDANT'S CONVICTION OR ENTITLE HIM TO HIS REQUESTED RELIEF

A bill of attainder is a law which "imposes guilt, and inflicts punishment, upon an identifiable individual or group without judicial process." Redwood Gym v. Salt Lake County Comm'n, 624 P.2d 1138, 1147 (Utah 1981); see Nixon v. Administrator of General Services, 433 U.S. 425, 468 (1977).

Defendant contends that the impounding of his car constitutes an unlawful bill of attainder because he was required to pay a fine to get the car back without any judicial declaration of guilt. Appellant's Brief I at 6. In addition, defendant's pro se brief claims that the breaking of the car window and his incarceration for 22 days under the imposition of "excessive" bail constitute unlawful bills of attainder. Appellant's Brief II at 1, 10-11.

Once again, this issue was not preserved below, and defendant argues neither plain error nor exceptional

circumstances.<sup>7</sup> Neither brief provides any legal analysis or citation to the record. Accordingly, this Court should decline to reach the merits of the claims. Sepulveda, 842 P.2d at 917-18; Webb, 790 P.2d at 77; Hoyt, 806 P.2d at 208-09; Ortiz, 782 P.2d at 962.

Furthermore, defendant seeks only reversal of his conviction. Appellant's Brief I at 9; Appellant's Brief II at 20. Assuming, arguendo, that this issue could be resolved in defendant's favor, he would not be entitled to the requested relief because his conviction was obtained independent of the impounding of his car, the breaking of its window, or the imposition of bail.

#### POINT VI

THIS COURT NEED NOT REACH DEFENDANT'S CHALLENGE TO THE JURY INSTRUCTIONS AS IT WAS NOT PRESERVED BELOW, MANIFEST INJUSTICE IS NOT ARGUED ON APPEAL, AND NO RECORD CITATIONS OR STANDARD OF REVIEW APPEAR IN THE BRIEFS; ALTERNATIVELY, THE JURY INSTRUCTION ACCURATELY STATED THE DUTY OF THE JURY TO FOLLOW THE LAW AS STATED BY THE COURT, AND ITS USE DOES NOT CONSTITUTE ERROR

Defendant asserts that the trial court erroneously instructed the jury that it was required to follow the law as given to it by the court. Appellant's Brief I at 7-8; Appellant's Brief II at 19-20. He contends that the instruction essentially directed the jury that it was "bound by the law" and

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<sup>7</sup> His ineffective assistance claim on this issue is addressed in Point III, supra.

had to find him guilty. Appellant's Brief I at 7-8; Appellant's Brief II at 19-20.

Once again, this issue was not preserved below, and defendant does not establish any manifest injustice to enable this Court to reach the merits of his claim on appeal.<sup>8</sup> State v. Becker, 803 P.2d 1290, 1293 (Utah App. 1990); see also Utah R. Crim. P. 19(c) (requiring that the grounds of any objection to jury instructions be stated with specificity). The arguments in both briefs are devoid of record citations and statements of the appropriate standard of review. Hence, this Court need not reach the merits of defendant's claim. Christensen, 812 P.2d at 72-73.

In the event this Court grants defendant leniency to raise this issue for the first time on appeal based on the legal analysis in his pro se brief, Winter, 820 P.2d at 919-20, it will find defendant's position contrary to current law.

This Court will reverse based on an improper jury instruction only where defendant demonstrates prejudice stemming from the instructions viewed in the aggregate. State v. Haston, 811 P.2d 929, 931 (Utah App. 1991), rev'd. on other grounds, 846 P.2d 1276 (Utah 1993); State v. McCumber, 622 P.2d 353, 359 (Utah 1980), abrogated on other grounds, State v. Ramirez, 817 P.2d 774 (Utah 1991). The precise wording and specificity contained in an

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<sup>8</sup> Trial counsel expressly said that he had no objections to any of the jury instructions (Tr. 262), and defendant only generally objected to the giving of any jury instruction as constituting jury tampering (Tr. 265-66). See Point III, supra, for defendant's ineffective assistance claim.

instruction is left to the trial court's sound discretion, so long as the instruction does not misstate material rules of law. State v. Sherard, 818 P.2d 554, 560 (Utah App. 1991), cert. denied, 843 P.2d 516 (Utah 1992).

Jury Instruction Number 1, to which defendant objects, provided:

It is the duty of the Court to instruct you in the law that applies to this case, and it is your duty as jurors to follow the law as the Court states it to you, regardless of what you personally believe the law is or ought to be. On the other hand it is your exclusive province to determine the facts in the case, and to consider and weigh the evidence for that purpose.

(R. 78). Addendum C.

Defendant correctly recognizes the judge's right and duty to instruct the jury on the correct law to be followed. Sparf and Hansen v. United States, 156 U.S. 51, 106 (1895); see generally United States v. Washington, 705 F.2d 489, 494 (D.C. Cir. 1983). He admits that the judge has no duty to give an instruction to the contrary, but asserts that the challenged instruction in this case should have been omitted. Appellant's Brief I at 7.

Defendant relies on dicta in United States v. Moylan, 417 F.2d 1002 (4th Cir. 1969), cert. denied, 397 U.S. 910 (1970), to establish "the undisputed power of the jury to acquit, even if its verdict is contrary to the law as given by the judge and

contrary to the evidence."<sup>9</sup> Id., 397 U.S. at 1006. This language recognizes that once a jury enters deliberations, it may choose to acquit in disregard of the law or the evidence, and because they render a nonreviewable general verdict, the acquittal must stand.

The United States Supreme Court has contrasted this ability to disregard the law with the right to do so, indicating that juries enjoy the former power but not the latter right. In Sparf and Hansen v. United States, 156 U.S. 57 (1895), the Court upheld the validity of jury instructions concerning the jury's obligation to apply the law to the facts, stating:

Public and private safety alike would be in peril if the principle be established that juries in criminal cases may of right disregard the law as expounded to them by the court and become a law unto themselves. Under such a system, the principal function of the judge would be to preside and keep order while jurymen, untrained in the law, would determine questions affecting life, liberty, or property according to such legal principles as in their judgment were applicable to the particular case being tried. . . . Upon the court rests the responsibility of declaring the law; upon the jury, the responsibility of applying the law so declared to the facts as they, upon their conscience, believe them to be. Under any other system, the courts, although established in order to declare the law, would for every practical purpose be eliminated from our system of government as instrumentalities devised for the protection equally of society and of individuals in the essential rights. When that occurs our government will cease to be a government of

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<sup>9</sup> Moylan established that defendants are not entitled to an instruction informing the jury of their ability to acquit without regard to the law or the evidence.



laws, and become a government of men.  
Liberty regulated by law is the underlying  
principle of our instructions.

Id., 156 U.S. at 101-03 (emphasis added).

The distinction between the jury's ability to acquit contrary to the law simply because deliberations are nonreviewable and the non-existent right to do so is well-recognized in other jurisdictions. See United States v. Avery, 717 F.2d 1020, 1027 (6th Cir. 1983) ("Although jurors may indeed have the power to ignore the law, their duty is to apply the law as interpreted by the court and they should be so instructed"), cert. denied, 466 U.S. 905 (1984); Washington, 705 F.2d at 494 ("A jury has no more 'right' to find a 'guilty' defendant 'not guilty' than it has to find a 'not guilty' defendant guilty," and the fact that the former cannot be corrected by a court, while the latter can be, does not create a right out of the power to misapply the law. Such verdicts are lawless, a denial of due process and constitute an exercise of erroneously seized power. Any arguably salutary functions served by inexplicable jury acquittals would be lost if that prerogative were frequently exercised; indeed, calling attention to that power could encourage the substitution of individual standards for openly developed community rules"); United States v. Coupez, 603 F.2d 1347, 1352 (9th Cir. 1979) (recognizing that although "'jurors may have the power to ignore the law, . . . their duty is to apply the law as interpreted by the court, and they should be so instructed.'"") (citations omitted).

The instruction in this case did no more than correctly explain to the jury their duty. Therefore, defendant has not established any error in the court's use of the instruction.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm defendant's convictions and sentences.

RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of September, 1993.

JAN GRAHAM  
Attorney General

  
KRIS C. LEONARD  
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing Brief of Appellee was mailed, postage prepaid, to Cleve J. Hatch, Utah County Public Defender Assoc., attorney for appellant, 40 South 100 West, Suite 200, Provo, Utah 84601, this 27<sup>th</sup> day of September, 1993.



## ADDENDA

## ADDENDUM A

Miller v. Utah Light & Traction Co., 96 Utah 369, 86 P.2d 37 (1939).

Cited in City of Salina v. Wisden, 737 P.2d 981 (Utah 1987).

## COLLATERAL REFERENCES

Am. Jur. 2d. — 7A Am. Jur. 2d Automobiles and Highway Traffic § 19.

C.J.S. — 60 C.J.S. Motor Vehicles § 43. Key Numbers. — Automobiles ⇐ 10.

### 41-6-13.5. Failure to respond to officer's signal to stop — Fleeing — Traveling at excessive speeds or causing property damage or bodily injury — Penalties.

(1) An operator who, having received a visual or audible signal from a peace officer to bring his vehicle to a stop, operates his vehicle in willful or wanton disregard of the signal so as to interfere with or endanger the operation of any vehicle or person, or who attempts to flee or elude a peace officer by vehicle or other means is guilty of a class A misdemeanor.

(2) An operator who violates Subsection (1) and while so doing: (a) travels in excess of 30 miles per hour above the posted speed limit; (b) causes damage to the property of another or bodily injury to another; or (c) leaves the state, is guilty of a felony of the third degree.

History: C. 1953, 41-6-13.5, enacted by L. 1978, ch. 33, § 38; L. 1981, ch. 269, § 1; 1987, ch. 138, § 6.

Amendment Notes. — The 1987 amendment in Subsection (1) substituted "peace officer" for "police officer" near the beginning of the subsection and near the end substituted "a peace officer by vehicle or other means is" for "the police shall be"; in Subsection (2) designated the previously undesignated clauses and

in Subsection (2)(a) substituted "30 miles per hour above the posted speed limit" for "90 miles per hour"; and made minor changes in phraseology and punctuation throughout the section.

Cross-References. — Sentencing for felonies, §§ 76-3-201, 76-3-203, 76-3-301.

Sentencing for misdemeanors, §§ 76-3-201, 76-3-204, 76-3-301.

### 41-6-14. Emergency vehicles — Applicability of traffic law to highway work vehicles — Exemptions.

(1) The operator of an authorized emergency vehicle, when responding to an emergency call or when in the pursuit of an actual or suspected violator of the law or when responding to but not upon returning from a fire alarm, may exercise the privileges under this section, subject to Subsection (2).

(2) The operator of an authorized emergency vehicle may:

- (a) park or stand, irrespective of the provisions of this chapter;
- (b) proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;
- (c) exceed the maximum speed limits if the operator does not endanger life or property; or
- (d) disregard regulations governing direction of movement or turning in specified directions.

(3) Privileges granted under this section to an authorized emergency vehicle apply only when the vehicle sounds an audible signal under Section 41-6-146, or uses a visual signal as defined under Section 41-6-132, which is visible from in front of the vehicle.

**PART 3**  
**OBSTRUCTING GOVERNMENTAL OPERATIONS**

**76-8-305. Interference with arresting officer.**

A person is guilty of a class B misdemeanor if he has knowledge, or by the exercise of reasonable care should have knowledge, that a peace officer is seeking to effect a lawful arrest or detention of that person or another and interferes with the arrest or detention by:

- (1) use of force or any weapon;
- (2) the arrested person's refusal to perform any act required by lawful order:
  - (a) necessary to effect the arrest or detention; and
  - (b) made by a peace officer involved in the arrest or detention; or
- (3) the arrested person's or another person's refusal to refrain from performing any act that would impede the arrest or detention.

**History:** C. 1953, 76-8-305, enacted by L. 1981, ch. 62, § 1; 1990, ch. 274, § 1.

**Amendment Notes.** — The 1990 amendment, effective April 23, 1990, substituted

"that person" for "himself" in the introductory language, added the subsection designation (1), added Subsections (2) and (3), and made stylistic changes.

## ADDENDUM B

FILED IN  
4TH DISTRICT COURT  
STATE OF UTAH  
UTAH COUNTY

AUG 7 9 42 AM '92

NA

CLEVE J. HATCH (5609)  
PUBLIC DEFENDERS INC.  
40 South 100 West, Suite 200  
Provo, Utah 84601  
Telephone 374-1212

IN THE FOURTH JUDICIAL DISTRICT COURT, FOR UTAH COUNTY

STATE OF UTAH

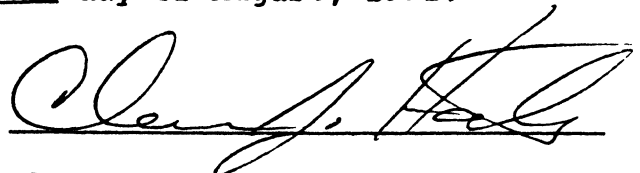
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STATE OF UTAH,	:	MOTION TO CONTINUE TRIAL
Plaintiff,	:	Case No. 921400096
vs.	:	
JAMES C. QUADA,	:	
Defendant.	:	

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Comes now, James C. Quada, by and through his counsel of record, Public Defenders Inc. Cleve J. Hatch, and requests that trial in this matter be continued from the August 17, 18, 1992 date on which it has now been continued to, for the reason that Mr. Hatch has another trial in district court set for those days and that defendant is in custody, in the Utah County Jail.

Respectfully submitted this, 6 day of August, 1992.

  
Cleve J Hatch

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Motion, postage prepaid, to C. Kay Bryson, 100 East Center Suite 2100, Provo, Utah 84606, this 6 day of August, 1992.





1 case today. If that is the case then we might ask you to  
2 stay into the evening to make your decision. If not, if it  
3 appears we can't get the case on we will come back tomorrow  
4 and spend another day at it. I will give you your choice.  
5 When we get down there and it looks like we are going to get  
6 through with the testimony and the case winds up, if you  
7 want to stay and finish it we will let that be a choice  
8 that you can make. Otherwise you can come back tomorrow.  
9 Okay, we will excuse you then.

10 (WHEREUPON, the jury was excused to go with the bailiff)

11 THE COURT: Mr. Musselman did you want to make  
12 a motion?

13 MR. MUSSELMAN: Yes, Your Honor. The court, of  
14 course, is aware that we filed a few weeks ago a written  
15 motion to continue this matter for a number of reasons  
16 one of which was that Mr. Hatch has been the attorney  
17 responsible for this case. He is involved in a case before  
18 Judge Harding at this particular time. We argued that  
19 at the pre-trial conference and the court made its ruling  
20 and denying that motion. I don't wish to argue with the  
21 court's ruling but simply to call the court's attention that  
22 Mr. Quada has informed me this morning that he feels that  
23 he is unprepared to proceed. He feels that he had less than  
24 adequate time to consult with the attorney who is trying the  
25 case, namely myself. He has asked me that I allow him to

## ADDENDUM C

**FILED**  
Fourth Judicial District Court  
of Utah County, State of Utah  
CARMA B. SMITH, Clerk  
8-17-92 Deputy

IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

\*\*\*\*\*

STATE OF UTAH

Case No.: 921400096

Plaintiff,

-vs-

INSTRUCTIONS TO THE JURY

JAMES C. QUADA

Defendant.

\*\*\*\*\*

MEMBERS OF THE JURY:

INSTRUCTIONS NO. 1

It is the duty of the Court to instruct you in the law that applies to this case, and it is your duty as jurors to follow the law as the Court states it to you, regardless of what you personally believe the law is or ought to be. On the other hand, it is your exclusive province to determine the facts in the case, and to consider and weigh the evidence for that purpose.

The authority thus vested in you is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with rules of law stated to you.