

2004

Michael Richard Schubarth v. State of Utah : Appeal from a Order

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MICHAEL RICHARD SCHUBARTH)
Appellant.)

v.)

STATE OF UTAH)
Appellee.)

Case No. 20040361-CA

Priority: 2

APPEAL FROM A ORDER TO SHOW CAUSE HEARING, WHERE THE
APPELLANT WAS FOUND IN VIOLATION OF HIS PLEA AGREEMENT

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ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED

FILED
UTAH APPELLATE COURTS

AUG 16 2004

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Priority: 2

APPELLANT BRIEF MICHAEL RICHARD SCHUBARTH

STATEMENT OF JURISDICTION

The rule or statutory authority that confers jurisdiction on the Court of Appeals to decide the appeal is Utah Rules of Appellate Procedure Rule 3. “An appeal may be taken from a district or juvenile Court to the appellate court from all final orders or judgments”. On or about November 26th, 2002, Michael Richard Schubarth entered into a plea in abeyance agreement. During an Order to Show Cause hearing on or about January 29, 2004, Judge Anderson found that Mr. Schubarth had violated his plea in abeyance agreement, the guilty pleas were entered against Mr. Schubarth. Judge John R. Anderson sentenced Mr. Schubarth on April 27, 2004.

STATEMENT OF THE ISSUES

I. Was the plea in abeyance agreement void because it was not entered in accordance with Utah Code Annotated Section 77-2a-2(5) and therefore did the trial court err in not allowing a misplea.

STANDARD OF REVIEW. A question of statutory interpretation is reviewed for correctness, granting no deference to the trial court's ruling. State v. Norton, 67 P. 3d 1050 (Utah App. 2003).

II. Did the trial court err when the trial court found that Mr. Schubarth violated a law; by issuing a bad check.

Point I

The State did not introduce sufficient evidence for the trial court to find that Mr. Schubarth had violated a law; by writing a bad check.

STANDARD OF REVIEW. The court's findings are reviewed under a clearly erroneous standard. Utah Dept. of Transp. v. G. Kay, Inc., 78 P.3d 612 (Utah 2003).

Point II

Mr. Schubarth argues that the court violated his due process rights by denying him the opportunity to confront adverse witnesses.

STANDARD OF REVIEW. "We review the trial court's decision to revoke defendant's probation for correctness and accord it no particular deference." State v. Tate, 989 P.2d 73 ¶ 8 (Utah Ct App. 1999).

III. Did the trial err in interpreting the plea in abeyance agreement and therefore err in revoking Mr. Schubarth's probation.

STANDARD OF REVIEW. The court reviews the trial court's decision to revoke

defendant's probation for correctness and accords it no particular deference. State v. Tate, 989 P.2d 73 ¶ 8 (Utah Ct. App. 1999).

Interpretation of a contract presents a question of law reviewed for correctness. Green River Canal Co. v. Thayn, 84 P.3d 1134 (Utah 2003).

CITATION TO THE RECORD THAT THE ISSUE WAS PRESERVED IN THE
TRIAL COURT.

Issue I. The Appellant preserved this issue by written motion to the judge and at the Order to Show Cause hearing: The Court: "Okay, help me with this one. I am concerned about this one." R. at 705. Tr. p. 8, line 17-18. Mr. Thomas: "Yes." R. at 705. Tr. p. 8, line 19. The Court: "The statute says a plea in abeyance cannot exceed three years. What are we going to do with that? R. at 705. Tr. p. 8, line 20 & 21. Mr. Thomas: I reviewed that statute as well, and that was brought up, of course, by the defendant in his handwritten motion." R. at 705. Tr. p. 8, line 22-24. The defendant's counsel further stated: Mr. Beaslin: Well, I've reviewed that motion also, you Honor. That's 77-2(a)- 2(5) on that three-year abeyance as indicated." R. at 705. Tr. p. 10, line 4-6. Further during Mr. Schubarth's testimony he stated: "The plea agreement was dropped on me that day, and it was set for six years. No one said there was a three-year statute, and I asked to counter . . ." R. at 705. Tr. p. 51, line 6-8. If the defendant did not properly preserve this issue he argues plain error.

Issue II. The State of Utah tried to introduce hearsay evidence with regard to Mr.

Schubarth having a bad check charge in Nevada. R. at 705. Tr. p. 22, line 7-18. Mr. Schubarth's counsel objected, "I think maybe I'd object to that, your Honor". R. at 705, Tr. p. 23, line 9-10. Other hearsay evidence was introduced and Mr. Schubarth's counsel objected, "Your Honor, I would object to that as being hearsay, your Honor." R. at 705, Tr. p. 25, line 22-23. If the defendant did not properly preserve this issue he argues plain error.

Issue III. Mr. Schubarth's attorney argued that the court should interpret the agreement in the way that the first payment was paid on time. "So I think you can interpret those from what Mr. Schubarth has said here today, and also the fact (inaudible) he was in fact incarcerated he did pay what would be the \$22,800, which was the first payment, but the same was late." R. at 705. Tr. p. 55, line 9-12. If this issue was not properly reserved Mr. Schubarth argues plain error.

STATEMENT OF THE CASE

I. Nature of the Case

The appeal is taken from the guilty pleas entered by Judge Anderson after an order to show cause hearing was held on January 29, 2004. The appeal is taken from the entry of the guilty pleas and the sentence.

II. Course of Proceedings

On November 26, 2002, the State of Utah and Mr. Schubarth entered into a plea agreement. The agreement stated, ""Defendant shall make payment towards restitution in

the amount of \$22,880.00 each six months. If payments in the amount of \$22,880.00 have not been paid, the defendant will appear in this court for a hearing to determine if he has substantially complied with the restitution payments.” R. at 344.

The State of Utah believed that Mr. Schubarth had violated the plea in abeyance agreement and filed an Order to Show Cause. R. at 396. The Order to Show Cause hearing was held on January 29, 2004. R. at 557. At the Order to Show Cause hearing the court found that Mr. Schubarth violated his plea in abeyance agreement. R. at 705. Tr. p. 58, line 3-9. Mr. Schubarth was sentenced on April 27, 2004. R. at 706.

III. Statement of the Facts

On or about November 26, 2002, Mr. Schubarth entered into a plea in abeyance agreement with the State of Utah. R. at 344-366. In accordance with the agreement, Mr. Schubarth pled no contest to thirty one counts. R. at 344-346. In exchange for Mr. Schubarth’s plea, the pleas were to be held in abeyance for six years. R. at 359. In accordance with the agreement Mr. Schubarth agreed to violate no laws of the United States, the State of Utah or any municipality during the term of this agreement. R. at 359. Further, Mr. Schubarth agreed to make payments toward restitution in the amount of \$22,880.00 each six months. R. at 360. The agreement further stated that “if the payments in the amount of \$22,880.00 have not been paid, the defendant will appear in this court for a hearing to determine if he has substantially complied with the restitution payments”. R. at 360. Finally, the agreement stated that Mr. Schubarth “shall make full

payment of restitution on or about November 26, 2008. Failure to pay the full amount of restitution on or about November 26, 2008 is a violation of this agreement and shall result in the entry on the record of all pleas.” R. at 361.

Believing that Mr. Schubarth had violated the plea agreement the State of Utah filed an Order to Show Cause. R. at 396-400. The Order to Show Cause hearing was held on January 29, 2004. R. at 557-560 and R. at 705. At the hearing evidence was introduced that Mr. Schubarth had made a restitution payment of \$10,000.00 on May 28, 2003. R. at 705, Tr. p. 21, line 3-9. Mr. Schubarth made another restitution payment of \$12,880.00 on July 8, 2003. R. at 705, Tr. p. 21, line 16-17. See Exhibit 1. R. at 707.

The State of Utah also introduced hearsay evidence that Mr. Schubarth had written a bad check in Nevada. “After this plea had entered, had you received notification from any Nevada authority that the defendant had been charged with issuing a bad check?” R. at 705, Tr. p. 22, line 7-9. “Yes, I was notified by the Nevada Attorney General’s office that he had been criminally charged, and that a warrant had been issued for his arrest for issuing a bad check”. R. at 22, Tr. p. 22, line 10-12. However, at the hearing Mr. Schubarth clearly testified that he had not been convicted of any charge. R. at 705, Tr. p. 48, line 16-17. The State did not introduce any evidence that Mr. Schubarth was convicted of any charge, including the bad check charge.

In addition, the State of Utah introduced numerous hearsay statements regarding other possible criminal charges against the defendant. R. at 705. After the court heard

the evidence, the court found that Mr. Schubarth had violated the plea in abeyance agreement. R. at 705, Tr. p. 58, line 10-11. The court used the following rationale to determine that the agreement was violated: “I’m not going to give a lot – any reliance on the theft by false pretenses case. He hasn’t been convicted yet. He has a presumption of innocence on that.” R. at 705. Tr. p. 57, line 23-25. “I’m not going to use that for a basis. He did violate a law. He wrote a bad check and was apparently satisfied that in the Sparks, Nevada Justice Court, and he did not make the payment of \$22,8800 on the due date.” R. at 705, Tr. p. 58, line 3-6.

Summary of Argument

Issue I: Mr. Schubarth argues that the trial court erred in not declaring a misplea and setting the matter for a trial, because the plea in abeyance agreement was entered in violation of Utah Code Annotated Section 77-2a-2(5). Since the agreement was entered in violation of Section 77-2a-2(5) there is obvious error. By declaring a misplea neither party will be prejudiced.

Issue II:

Point I: The State did not introduce sufficient evidence for the court to find that Mr. Schubarth had violated a law; by writing a bad check.

Point II: Mr. Schubarth argues that the court violated his due process right by denying him the opportunity to confront adverse witnesses.

Issue III: Mr. Schubarth argues that the trial court erred in interpreting the plea in

abeyance agreement. The court used a time is of the essence standard in determining whether Mr. Schubarth complied with the plea in abeyance agreement. The proper standard of review should be whether Mr. Schubarth had substantially complied with the agreement. Mr. Schubarth argues that he did substantially comply with the agreement and therefore, he did not violate the agreement. Mr. Schubarth further argues the only strict deadline of payment in the agreement was that the total restitution was to be paid on or about November 26, 2008.

ARGUMENT I

ISSUE

WAS THE PLEA IN ABEYANCE AGREEMENT VOID BECAUSE IT WAS NOT ENTERED IN ACCORDANCE WITH UTAH CODE ANNOTATED SECTION 77-2a-2(5) AND THEREFORE DID THE COURT ERR IN NOT ALLOWING A MISPLEA

RULE

“‘[T]he trial court may not refuse to comply with the terms of the accepted plea agreement unless circumstances justify the declaration of a misplea [i.e., manifest necessity]; otherwise, the double jeopardy clause will preclude a subsequent trial of the defendant.’” State v. Moss, 921 P. 2d 1021, ¶ 6 (Utah Ct. App. 1996) citing (State v. Kay, 717 P.2d 1294 (Utah 1986)). “The court stated, a “‘misplea can properly be granted [1] where obvious reversible error has been committed in connection with the terms of the acceptance of the plea agreement and [2] no undue prejudice to the defendant is apparent.” Id. at ¶ 6.

“The court in Kay explained when manifest necessity exists, i.e., when the trial court has committed obvious reversible error.” State v. Moss, at ¶ 7. “From a review of the due process cases discussed herein and Kay’s conclusion that there is no undue prejudice so long as the defendant is restored to the same position as he or she would have been in absent the plea, we conclude that to establish undue prejudice a defendant must show that he or she has taken some affirmative action which would materially and substantially affect the outcome of a subsequent trial. Id. at ¶ 8.

Analysis

In this matter Mr. Schubarth believes that the court should have declared a misplea and set the matter for trial. It is clear that even the trial court understood this alternative, but chose not to declare a misplea. The trial court stated, “Yeah, and I guess the alternative is – the alternative is to set it aside totally and find a trial date.” R. at 705, Tr. p. 11, line 1-2. Mr. Schubarth argues that the proper procedure would have been for the court to follow his first reaction and set the plea aside and set a new trial date.

In Moss v. State, the defendant entered into a plea in abeyance agreement with the State of Utah. Moss, 921 P.2d 1021 (Utah Ct. App). The defendant had been charged with a first degree felony of rape of a child. Id. As part of a plea bargain the defendant agreed to pled guilty to “attempted sexual abuse of a child, a third degree felony, on the condition his plea be held in abeyance for twenty-four months at which time the charges would be dismissed upon the trial court’s determination that defendant had complied with

the terms of the plea agreement”. Id.

Subsequent to the defendant pleading guilty, the Utah Attorney General’s Office determined defendant’s plea violated section 77-2a-3(7), which prohibited entry of a plea in abeyance in any case involving allegations of a sexual abuse against a victim younger than fourteen years of age. Id. When the problem was brought to the attention of the trial court, the trial court set the plea aside. Id. In Moss, the court held that there would be no double jeopardy problem if there is a misplea based on a showing of Manifest necessity and no undue prejudice to the defendant. Id.

In Moss, the court noted that there is manifest necessity where obvious reversible error has been committed in connection with the terms of the acceptance of the plea agreement. Id. In Moss, the court held that when a plea is taken in contravention of the express terms of section 77-2a-3(7), that this constituted obvious reversible error. Id.

Likewise, Mr. Schubarth argues that his plea should be declared a misplea based on manifest necessity. Mr. Schubarth’s plea in abeyance agreement placing him on probation for 6 years was taken in contravention of the express terms of Utah Code Annotated Section 77-2a-2(5), which states that a plea in abeyance for a felony cannot be for a period longer than three years. Since Mr. Schubarth’s plea in abeyance agreement clearly violates Utah Code Annotated Section 77-2a-2(5) it is obvious reversible error.

With regard to the second prong, undue prejudice, Mr. Schubarth will receive no undue prejudice by setting the plea agreement aside, both parties would be restored to

their original, pre-plea positions.

Wherefore, Mr. Schubarth requests that the court declare a misplea and set the matter for trial, placing both parties in the position they were in before the plea.

ARGUMENT II

ISSUE

DID THE COURT ERR WHEN THE COURT FOUND THAT MR. SCHUBARTH
VIOLATED A LAW, BY ISSUING A BAD CHECK

POINT I

THE STATE DID NOT INTRODUCE SUFFICIENT EVIDENCE FOR THE COURT
TO FIND THAT MR. SCHUBARTH HAD VIOLATED A LAW BY WRITING A BAD
CHECK

RULE

The trial court's findings are reviewed under a clearly erroneous standard. Utah Dept. of Transp. v. G. Kay Inc., 78 P.3d 612 (Utah 2003).

ANALYSIS

In the courts findings the court states, "He did violate a law. He wrote a bad check and was apparently satisfied that in the Sparks, Nevada Justice Court . . ." R. at 705, Tr. p. 58, lines 3-4. This finding is clearly erroneous and goes against the evidence admitted at the Order to Show Cause hearing. The only evidence introduced at the hearing that Mr. Schubarth had violated a law by writing a bad check is as follows: the State introduced

the following evidence by Michael Hines: “After this plea had entered, had you received notification from any Nevada authority that the defendant had been charged with issuing a bad check?” R. at 705, Tr. p. 22, line 7-9. “Yes, I was notified by the Nevada Attorney General’s Office that he had been criminally charged, and that a warrant had been issued for his arrest for issuing a bad check.” R. at 705, Tr. p. 22, line 10-12. “Okay. During that were you also notified and/or did you have an opportunity to review documents that defendant also received a warrant for failure to appear in that particular case?” R. at 705, Tr. p. 22, line 13-16. “So this really addresses a charge having been filed and his failure to appear, but it doesn’t say what happened to it, right? That is correct.” R. at 705, Tr. p. 23, line 5-8. Mr. Schubarth’s attorney then stated, “I think maybe I’d object to that, your Honor, as to the issue because it doesn’t set forth what happened after that or if he was picked up or what happened. It only says a charge was made.” R. at 705, Tr. p. 23, line 9-12.

In addition, to the statements made above by Michael Hines, the state introduced into evidence a certified court docket showing that a complaint had been filed against Mr. Schubarth for drawing and passing a check without sufficient funds with intent to Defraud. See Exhibit 2. R. at 707. The only thing contained on this exhibit was information that Mr. Schubarth had been charged and had failed to appear for a hearing. There is no indication that Mr. Schubarth was found guilty. Further, since this was not a felony there was not even a probable cause statement for a bind-over. Finally, Mr.

Schubarth testified that he pled not guilty. R. at 705, Tr. p. 39, line 7-8.

In this matter, the State of Utah and the court have equated being charged with a crime as the same as violating a crime. The State of Utah introduced evidence that Mr. Schubarth was charged with a crime but they produced no evidence that he violated a crime. They never produced witnesses testifying that he wrote a check, that the check was signed by him, that there was insufficient funds in an account, nothing. The State of Utah believes it is enough to show that one is charged with a crime and that is sufficient.

Mr. Schubarth argues that this is insufficient evidence to prove that he violated a crime under a preponderance of an evidence standard. Wherefore, Mr. Schubarth believes the court clearly erred in finding that he had violated a law, by writing a bad check.

POINT II

MR. SCHUBARTH ARGUES THAT THE COURT VIOLATED HIS DUE PROCESS
RIGHT BY DENYING HIM THE OPPORTUNITY TO CONFRONT ADVERSE
WITNESS

RULE

“In probation revocation proceedings where the defendant denies violating the conditions of his or her parole, the persons who have given adverse information on which the allegations are based shall be presented as witnesses subject to questioning by the defendant unless the court for other good cause otherwise orders.” State v. Tate, 989

P.2d73 ¶ 11 (Utah App. Ct. 1999). A finding of good cause required the trial court to balance the defendant's interest in cross-examining a witness against the State's need to use a particular hearsay statement. Id.

ANALYSIS

In Tate, and in the present case, the defendant's were brought before the court to revoke their probation. In Tate and in the present case, the State of Utah, sought to make its case solely through hearsay evidence, neither in Tate nor the present case did the State call individuals with personal knowledge of the alleged incidents. Finally, in Tate and in the present case, both trial courts failed to determine there is good cause for not permitting the probationer to cross-examine the out-of-court declarant whose statement is sought to be introduced as evidence, before admitting hearsay.

In Tate, the Court concluded that the trial court's admission of hearsay, in the absence of a specific finding of good cause for denying confrontations, constitutes reversible error. Id. at ¶17. The Court held that the trial court improperly determined that Tate violated his probation and therefore vacated the trial court's order terminating his probation. Id.

In this matter, Mr. Schubarth requests that the order terminating his probation be vacated. He believes that the trial court acted improperly by not allowing him to cross-examine the individuals who alleged that he had written a bad check, including cross-examining individuals about the following information: that Mr. Schubarth had written a

bad check, that he signed the check and that he had insufficient funds in his account etc.

ARGUMENT III

ISSUE

DID THE TRIAL COURT ERR IN INTERPRETING THE PLEA IN ABEYANCE
AGREEMENT AND THEREFORE ERROR IN REVOKING MR. SCHUBARTH'S
PROBATION

RULE

Interpretation of a contract presents a question of law reviewed for correctness. Green River Canal Co. v. Thayn, 84 P.3d 1134 (Utah 2003) “We construe an ambiguous order under the rules that apply to other legal documents. Specifically, we look to the language of the order, and we [may] resort to the pleadings and findings. Where construction is called for, it is the duty of the court to interpret an ambiguity [in a manner that makes] the judgement more reasonable, effective, and conclusive, and [that] brings the judgement into harmony with the facts and the law.” Culbertson v. Board of County Commissioners of Salt Lake County, 44 P.3d 642 ¶ 15 (Utah 2002). “In addition, we construe any ambiguities in the order against the prevailing parties who drafted it . . .” Id.

Mr. Schubarth believes this issue was preserved on the record when his counsel stated, “So I think you can interpret those from what Mr. Schubarth has said here today, and also the fact (inaudible) he was incarcerated he did pay what would be the \$22,880, which was the first, but the same was late.” R. at 705. Tr. p. 55, line 9-12. If this issue

was not preserved Mr. Schubarth argues plain error. “Plain error requires a showing that “(i) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable out come for the [appellant].” State v. Garcia, 18 P.3d 1123 ¶ 6, (Utah Ct. App. 2001).

ANALYSIS

In this matter, Mr. Schubarth believes that the manner in which the State of Utah argued and the way the trial Court interpreted the plea agreement to be in direct conflict with the written terms of the agreement. Specifically, Mr. Schubarth believes the trial court used a time is of the essence standard, instead of a substantial compliance standard in determining whether Mr. Schubarth was in compliance with the six month payment due date.

The terms of the plea in abeyance agreement are as follows:

First, Mr. Schubarth was to pay restitution in the amount of \$274,550.00. R.at 360. The agreement further states, “[d]efendant shall make full payment of restitution on or before November 26, 2008. Failure to pay the full amount of restitution on or before November 26, 2008 is a violation of this agreement and shall result in the entry on the record of all pleas.” R.at 360-361.

Mr. Schubarth believes that the date of November 26, 2008 was a strict deadline and time was of the essence that all restitution payments had to be made on or before November 26, 2008, or Mr. Schubarth would be in violation of the agreement. However,

Mr. Schubarth believes that the six month payment dates were not strict, time is of the essence due dates, this is based on the written agreement.

Second, the agreement stated, “[d]efendant shall make payments toward restitution in the amount of \$22,880.00 each six months. If payments in the amount of \$22,880.00 have not been paid, the defendant will appear in this court for a hearing to determine if he has substantially complied with the restitution payments.” R. at 360.

It is important to note that this part of the agreement does not give specific dates that the payments are due. The agreement goes further explaining that it is possible that the \$22,880.00 may not be paid within the six month period. In that event, the defendant was to appear in court and if the court found that he had substantially made the payment for that six month period he would not be in violation of the agreement.

The clear language of the agreement shows that Mr. Schubarth was to have the full restitution payment of \$274,550.00 paid by November 26, 2008. However, the individual six month payments did not need to be paid in full or on exact dates as long as Mr. Schubarth was making substantial payments toward the full restitution or substantial payment toward \$22,880.00 for that six month period.

Even the State’s own testimony indicates that the six month periods and amounts were not exact periods of time or amounts. Mr. Thomas the prosecutor asked his witness Michael Hines, “Okay, and was it also ordered then that he was to make regular payments specifically **approximately** (bold and underlining added) \$22,000.00 each six months?

That is correct”. R.at 705. Tr. p. 19, line 12-15. Later, the witness was asked, “Okay. So the first six-month period would **roughly** (bold and underlining added) be around the May 26th date– That’s correct”. R.at 705, Tr. p. 20, line 10-12.

The record clearly shows that even the State of Utah understood the agreement. That the six month payments did not have to be exactly complied with, that Mr. Schubarth could pay approximately the amount owed and pay it roughly within the six month period. However, in closing argument the State changed their story clearly arguing in direct contradiction to the agreement. The State argued that there was a specific due date and that Mr. Schubarth was late in the payment. In the Court’s findings it is clear that he followed the State’s argument when the Court stated, “he did not make payment of \$22,880.00 on the due date.” R. at 705, Tr. p. 58, line 5-6.

When interpreting a document, the language of the document should be interpreted in a way that gives full meaning to all provisions of the document. Culbertson v. Board of County Commissioners of Salt Lake County, 44 P. 3d 642 ¶ 15, (Utah 2002). If the document is interpreted as the State has argued and in accordance with the court’s finding then the language that the defendant was to appear before the court to determine if he has substantially complied with the restitution payments, has no meaning. Further, the court did not make appropriate findings that Mr. Schubarth did not comply as per the agreement. Finally, since it was the State of Utah that drafted the agreement all ambiguities should be construed against the State of Utah.

Therefore, since the Court did not use the appropriate standard in determining whether Mr. Schubarth had substantially complied with the agreement and since the Court did not make appropriate findings the order terminating probation and entering Mr. Schubarth's guilty pleas should be vacated.


CONCLUSION

The plea bargain is in direct violation of Utah Code Annotated Section 77-2a-2(5). Therefore, there is obvious reversible error and the court should declare a misplea, because either party will be prejudiced. The matter should be set for a trial.

The State of Utah did not provide sufficient evidence for the trial court to find that Mr. Schubarth had violated a law; by writing a bad check. Further, the trial court erred by not allowing Mr. Schubarth the opportunity to confront the witnesses that claimed that he had written a bad check.

The trial court erred in its interpretation of the plea agreement. The trial court applied a time is of the essence standard, instead of a substantial compliance standard as stated in the agreement. Wherefore, Mr. Schubarth requests that the matter be remanded and the correct standard applied to this case.

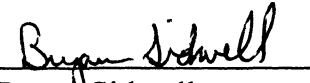
DATED this 16th day of August 2004.


Bryan Sidwell
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Appellant's brief was sent to the following by placing them in the U.S. mail, postage prepaid on August 16th, 2004.

J. Frederic Voros, Jr.
Assistant Attorney General
160 E. 300 S. 6th FL
P.O. Box 140854
Salt Lake City, Utah 84114-0854


Bryan Sidwell

ADDENDUM

ATTACHMENT A

Affidavit of Defendant in Advance of Guilty Plea Agreement R. 344-366

ATTACHMENT B

Exhibit 2

R. 707

ATTACHMENT A

G. Mark Thomas, #6664
Deputy Uintah County Attorney
152 East 100 North
Vernal, UT 84078
Telephone: (435) 781-5438
Fax: (435) 781-5428

FILED
DISTRICT COURT
UINTAH COUNTY UTAH

NOV 26 2002

BY JOANNE MOORE DEPUTY


IN THE EIGHTH JUDICIAL DISTRICT COURT

IN AND FOR UINTAH COUNTY, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, vs. MICHAEL RICHARD SCHUBARTH DOB: 07/09/1955 Defendant.	AFFIDAVIT OF DEFENDANT IN ADVANCE OF GUILTY PLEA AND AGREEMENT Case No. 011800166 Judge John R. Anderson
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I, **Michael Richard Schubarth**, hereby acknowledge and certify that I have been advised of and that I understand the following facts and rights:

Notification of Charges


 I am pleading ~~guilty~~ ^{No Contest} to the following crimes:


Crime & Statutory Provision	Degree	Punishment Min/Max and/or Minimum Mandatory
1. Securities Fraud	Third Degree Felony	Max. \$5,000.00 Fine 0 to 5 Years USP
2. Securities Fraud	Second Degree Felony	Max. \$10,000.00 Fine 1 to 15 Years USP
3. Securities Fraud	Second Degree Felony	Max. \$10,000.00 Fine 1 to 15 Years USP
4. Securities Fraud	Second Degree Felony	Max. \$10,000.00 Fine 1 to 15 Years USP
5. Securities Fraud	Second Degree Felony	Max. \$10,000.00 Fine 1 to 15 Years USP

(2)

Crime & Statutory Provision		Degree	Punishment Min/Max and/or Minimum Mandatory
6.	Securities Fraud	Second Degree Felony	Max. \$10,000.00 Fine 1 to 15 Years USP
7.	Securities Fraud	Third Degree Felony	Max. \$5,000.00 Fine 0 to 5 Years USP
8.	Securities Fraud	Third Degree Felony	Max. \$5,000.00 Fine 0 to 5 Years USP
9.	Securities Fraud	Third Degree Felony	Max. \$5,000.00 Fine 0 to 5 Years USP
10.	Securities Fraud	Third Degree Felony	Max. \$5,000.00 Fine 0 to 5 Years USP
11.	Securities Fraud	Third Degree Felony	Max. \$5,000.00 Fine 0 to 5 Years USP
12.	Securities Fraud	Second Degree Felony	Max. \$10,000.00 Fine 1 to 15 Years USP
13.	Securities Fraud	Second Degree Felony	Max. \$10,000.00 Fine 1 to 15 Years USP
14.	Sale of Unregistered	Third Degree Felony	Max. \$5,000.00 Fine 0 to 5 Years USP
15.	Sale of Unregistered	Third Degree Felony	Max. \$5,000.00 Fine 0 to 5 Years USP
16.	Sale of Unregistered	Third Degree Felony	Max. \$5,000.00 Fine 0 to 5 Years USP
17.	Sale of Unregistered	Third Degree Felony	Max. \$5,000.00 Fine 0 to 5 Years USP
18.	Sale of Unregistered	Third Degree Felony	Max. \$5,000.00 Fine 0 to 5 Years USP
19.	Sale of Unregistered	Third Degree Felony	Max. \$5,000.00 Fine 0 to 5 Years USP
20.	Sale of Unregistered	Third Degree Felony	Max. \$5,000.00 Fine 0 to 5 Years USP
21.	Sale of Unregistered	Third Degree Felony	Max. \$5,000.00 Fine 0 to 5 Years USP
22.	Sale of Unregistered	Third Degree Felony	Max. \$5,000.00 Fine 0 to 5 Years USP

Crime & Statutory Provision	Degree	Punishment Min/Max and/or Minimum Mandatory
23. Sale of Unregistered	Third Degree	Max. \$5,000.00 Fine
	Felony	0 to 5 Years USP
24. Sale of Unregistered	Third Degree	Max. \$5,000.00 Fine
	Felony	0 to 5 Years USP
25. Sale of Unregistered	Third Degree	Max. \$5,000.00 Fine
	Felony	0 to 5 Years USP
26. Sale of Unregistered	Third Degree	Max. \$5,000.00 Fine
	Felony	0 to 5 Years USP
27. Employment of Unlicensed Agent	Third Degree	Max. \$5,000.00 Fine
	Felony	0 to 5 Years USP
28. Employment of Unlicensed Agent	Third Degree	Max. \$5,000.00 Fine
	Felony	0 to 5 Years USP
29. Employment of Unlicensed Agent	Third Degree	Max. \$5,000.00 Fine
	Felony	0 to 5 Years USP
30. Employment of Unlicensed Agent	Third Degree	Max. \$5,000.00 Fine
	Felony	0 to 5 Years USP
31. Pattern of Unlawful Activity	Second Degree	Max. \$10,000.00 Fine
	Felony	1 to 15 Years USP

 I have received a copy of the Information against me. I have read it, or had it read to me, and I understand the nature and the elements of crime(s) to which I am pleading ~~guilty~~ **no contest**.

 The elements of the crime(s) to which I am pleading ~~guilty~~ **no contest** are:

COUNT 1 SECURITIES FRAUD, a Third Degree Felony, in Uintah County, State of Utah, on or about July 7, 2000, in violation of Utah Code Ann. §61-1-1 and §61-1-21, 1953, as amended, in that the defendant, **MICHAEL RICHARD SCHUBARTH**, a party to the offense, did willfully, in connection with the offer, sale or purchase of any security to **James E. Burns**, directly or indirectly; employed any device scheme or artifice to defraud; and/or made any untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and/or engaged in any act, practice, or course of business which operated or would

operate as a fraud or deceit upon any person and the amount was \$10,000.

COUNT 2 SECURITIES FRAUD, a Second Degree Felony, in Uintah County, State of Utah, on or about December 11, 2000, in violation of Utah Code Ann. §61-1-1 and §61-1-21, 1953, as amended, in that the defendant, **MICHAEL RICHARD SCHUBARTH**, a party to the offense, did willfully, in connection with the offer, sale or purchase of any security to **James E. Burns**, directly or indirectly; employed any device scheme or artifice to defraud; and/or made any untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and/or engaged in any act, practice, or course of business which operated or would operate as a fraud or deceit upon any person and the amount was more than \$10,000.

COUNT 3 SECURITIES FRAUD, a Second Degree Felony, in Uintah County, State of Utah, on or about October 2000, in violation of Utah Code Ann. §61-1-1 and §61-1-21, 1953, as amended, in that the defendant, **MICHAEL RICHARD SCHUBARTH**, a party to the offense, did willfully, in connection with the offer, sale or purchase of any security to **Dusty (Johnson) Grothusen**, directly or indirectly; employed any device scheme or artifice to defraud; and/or made any untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and/or engaged in any act, practice, or course of business which operated or would operate as a fraud or deceit upon any person and the amount was more than \$10,000.

COUNT 4 SECURITIES FRAUD, a Second Degree Felony, in Uintah County, State of Utah, on or about January 16, 2001, in violation of Utah Code Ann. §61-1-1 and §61-1-21, 1953, as amended, in that the defendant, **MICHAEL RICHARD SCHUBARTH**, a party to the offense, did willfully, in connection with the offer, sale or purchase of any security to **Brian Jensen**, directly or indirectly; employed any device scheme or artifice to defraud; and/or made any untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and/or engaged in any act, practice, or course of business which operated or would operate as a fraud or deceit upon any person and the amount was more than \$10,000.

COUNT 5 SECURITIES FRAUD, a Second Degree Felony, in Uintah County, State of Utah, on or about September 12, 2000, in violation of Utah Code Ann. §61-1-1 and §61-1-21, 1953, as amended, in that the defendant, **MICHAEL RICHARD SCHUBARTH**, a party to the offense, did willfully, in connection with the offer, sale or purchase of

(5)

any security to **Michael Nielson**, directly or indirectly; employed any device scheme or artifice to defraud; and/or made any untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and/or engaged in any act, practice, or course of business which operated or would operate as a fraud or deceit upon any person and the amount was more than \$10,000.

COUNT 6 SECURITIES FRAUD, a Second Degree Felony, in Uintah County, State of Utah, on or about January 29, 2001, in violation of Utah Code Ann. §61-1-1 and §61-1-21, 1953, as amended, in that the defendant, **MICHAEL RICHARD SCHUBARTH**, a party to the offense, did willfully, in connection with the offer, sale or purchase of any security to **Brian Skinner**, directly or indirectly; employed any device scheme or artifice to defraud; and/or made any untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and/or engaged in any act, practice, or course of business which operated or would operate as a fraud or deceit upon any person and the amount was more than \$10,000.

COUNT 7 SECURITIES FRAUD, a Third Degree Felony, in Uintah County, State of Utah, on or about November 16, 2000, in violation of Utah Code Ann. §61-1-1 and §61-1-21, 1953, as amended, in that the defendant, **MICHAEL RICHARD SCHUBARTH**, a party to the offense, did willfully, in connection with the offer, sale or purchase of any security to **Scott Sorenson**, directly or indirectly; employed any device scheme or artifice to defraud; and/or made any untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and/or engaged in any act, practice, or course of business which operated or would operate as a fraud or deceit upon any person and the amount was \$10,000.

COUNT 8 SECURITIES FRAUD, a Third Degree Felony, in Uintah County, State of Utah, on or about December 18, 2000, in violation of Utah Code Ann. §61-1-1 and §61-1-21, 1953, as amended, in that the defendant, **MICHAEL RICHARD SCHUBARTH**, a party to the offense, did willfully, in connection with the offer, sale or purchase of any security to **Scott Sorenson**, directly or indirectly; employed any device scheme or artifice to defraud; and/or made any untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and/or engaged in any act, practice, or course of business which operated or would operate as a fraud or deceit upon any person and the amount was less than \$10,000.

COUNT 9 SECURITIES FRAUD, a Third Degree Felony, in Uintah County, State of Utah, on or about November 29, 2000, in violation of Utah Code Ann. §61-1-1 and §61-1-21, 1953, as amended, in that the defendant, **MICHAEL RICHARD SCHUBARTH**, a party to the offense, did willfully, in connection with the offer, sale or purchase of any security to **Olin Draney**, directly or indirectly; employed any device scheme or artifice to defraud; and/or made any untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and/or engaged in any act, practice, or course of business which operated or would operate as a fraud or deceit upon any person and the amount was less than \$10,000.

COUNT 10 SECURITIES FRAUD, a Third Degree Felony, in Uintah County, State of Utah, on or about September 21, 2000, in violation of Utah Code Ann. §61-1-1 and §61-1-21, 1953, as amended, in that the defendant, **MICHAEL RICHARD SCHUBARTH**, a party to the offense, did willfully, in connection with the offer, sale or purchase of any security to **Julie Pierce**, directly or indirectly; employed any device scheme or artifice to defraud; and/or made any untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and/or engaged in any act, practice, or course of business which operated or would operate as a fraud or deceit upon any person and the amount was less than \$10,000.

COUNT 11 SECURITIES FRAUD, a Third Degree Felony, in Uintah County, State of Utah, on or about November 10, 2000, in violation of Utah Code Ann. §61-1-1 and §61-1-21, 1953, as amended, in that the defendant, **MICHAEL RICHARD SCHUBARTH**, a party to the offense, did willfully, in connection with the offer, sale or purchase of any security to **Julie Pierce**, directly or indirectly; employed any device scheme or artifice to defraud; and/or made any untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and/or engaged in any act, practice, or course of business which operated or would operate as a fraud or deceit upon any person and the amount was less than \$10,000.

COUNT 12 SECURITIES FRAUD, a Second Degree Felony, in Uintah County, State of Utah, on or about September 6, 2000, in violation of Utah Code Ann. §61-1-1 and §61-1-21, 1953, as amended, in that the defendant, **MICHAEL RICHARD SCHUBARTH**, a party to the offense, did willfully, in connection with the offer, sale or purchase of any security to **Arlene Thompson**, directly or indirectly; employed any device scheme or artifice to defraud; and/or made any untrue statement of a material fact or omitted to state a material fact

necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and/or engaged in any act, practice, or course of business which operated or would operate as a fraud or deceit upon any person and the amount was more than \$10,000.

COUNT 13 SECURITIES FRAUD, a Second Degree Felony, in Uintah County, State of Utah, on or about December 15, 2000, in violation of Utah Code Ann. §61-1-1 and §61-1-21, 1953, as amended, in that the defendant, **MICHAEL RICHARD SCHUBARTH**, a party to the offense, did willfully, in connection with the offer, sale or purchase of any security to **Arlene Thompson**, directly or indirectly; employed any device scheme or artifice to defraud; and/or made any untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and/or engaged in any act, practice, or course of business which operated or would operate as a fraud or deceit upon any person and the amount was more than \$10,000.

COUNT 14 SALE OF UNREGISTERED SECURITY, a Third Degree Felony, in Uintah County, State of Utah, in or about July 7, 2000, in violation of §61-1-7, and §61-1-21, Utah Code Annotated 1953, as amended, in that the defendant, **MICHAEL RICHARD SCHUBARTH**, a party to the offense, did willfully offer or sell any security to **James E. Burns**, in Utah which was not registered with the Division, nor was the investment a federally covered security for which a notice filing had been made with the Division, nor did the security qualify for an exemption from registration.

COUNT 15 SALE OF UNREGISTERED SECURITY, a Third Degree Felony, in Uintah County, State of Utah, in or about December 11, 2000, in violation of §61-1-7, and §61-1-21, Utah Code Annotated 1953, as amended, in that the defendant, **MICHAEL RICHARD SCHUBARTH**, a party to the offense, did willfully offer or sell any security to **James E. Burns**, in Utah which was not registered with the Division, nor was the investment a federally covered security for which a notice filing had been made with the Division, nor did the security qualify for an exemption from registration.

COUNT 16 SALE OF UNREGISTERED SECURITY, a Third Degree Felony, in Uintah County, State of Utah, in or about October 2000, in violation of §61-1-7, and §61-1-21, Utah Code Annotated 1953, as amended, in that the defendant, **MICHAEL RICHARD SCHUBARTH**, a party to the offense, did willfully offer or sell any security to **Dusty (Johnson) Grothusen**, in Utah which was not registered with the Division, nor was the investment a federally covered security for which a notice filing had been made with the Division, nor did the security qualify for an exemption from registration.

COUNT 17 SALE OF UNREGISTERED SECURITY, a Third Degree Felony, in Uintah County, State of Utah, in or about January 16, 2001, in violation of §61-1-7, and §61-1-21, Utah Code Annotated 1953, as amended, in that the defendant, **MICHAEL RICHARD SCHUBARTH**, a party to the offense, did willfully offer or sell any security to **Brian Jensen**, in Utah which was not registered with the Division, nor was the investment a federally covered security for which a notice filing had been made with the Division, nor did the security qualify for an exemption from registration.

COUNT 18 SALE OF UNREGISTERED SECURITY, a Third Degree Felony, in Uintah County, State of Utah, in or about September 12, 2000, in violation of §61-1-7, and §61-1-21, Utah Code Annotated 1953, as amended, in that the defendant, **MICHAEL RICHARD SCHUBARTH**, a party to the offense, did willfully offer or sell any security to **Michael Nielson**, in Utah which was not registered with the Division, nor was the investment a federally covered security for which a notice filing had been made with the Division, nor did the security qualify for an exemption from registration.

COUNT 19 SALE OF UNREGISTERED SECURITY, a Third Degree Felony, in Uintah County, State of Utah, in or about January 29, 2001, in violation of §61-1-7, and §61-1-21, Utah Code Annotated 1953, as amended, in that the defendant, **MICHAEL RICHARD SCHUBARTH**, a party to the offense, did willfully offer or sell any security to **Brian Skinner**, in Utah which was not registered with the Division, nor was the investment a federally covered security for which a notice filing had been made with the Division, nor did the security qualify for an exemption from registration.

COUNT 20 SALE OF UNREGISTERED SECURITY, a Third Degree Felony, in Uintah County, State of Utah, in or about November 16, 2000, in violation of §61-1-7, and §61-1-21, Utah Code Annotated 1953, as amended, in that the defendant, **MICHAEL RICHARD SCHUBARTH**, a party to the offense, did willfully offer or sell any security to **Scott Sorenson**, in Utah which was not registered with the Division, nor was the investment a federally covered security for which a notice filing had been made with the Division, nor did the security qualify for an exemption from registration.

COUNT 21 SALE OF UNREGISTERED SECURITY, a Third Degree Felony, in Uintah County, State of Utah, in or about December 18, 2000, in violation of §61-1-7, and §61-1-21, Utah Code Annotated 1953, as amended, in that the defendant, **MICHAEL RICHARD SCHUBARTH**, a party to the offense, did willfully offer or sell any security to **Scott Sorenson**, in Utah which was not registered with the Division, nor was the investment a federally covered security for which a notice filing had been made with the Division, nor did the security qualify for an exemption from registration.

COUNT 22 SALE OF UNREGISTERED SECURITY, a Third Degree Felony, in Uintah County, State of Utah, in or about November 29, 2000, in violation of §61-1-7, and §61-1-21, Utah Code Annotated 1953, as amended, in that the defendant, **MICHAEL RICHARD SCHUBARTH**, a party to the offense, did willfully offer or sell any security to **Olin Draney**, in Utah which was not registered with the Division, nor was the investment a federally covered security for which a notice filing had been made with the Division, nor did the security qualify for an exemption from registration.

COUNT 23 SALE OF UNREGISTERED SECURITY, a Third Degree Felony, in Uintah County, State of Utah, in or about September 21, 2000, in violation of §61-1-7, and §61-1-21, Utah Code Annotated 1953, as amended, in that the defendant, **MICHAEL RICHARD SCHUBARTH**, a party to the offense, did willfully offer or sell any security to **Julie Pierce**, in Utah which was not registered with the Division, nor was the investment a federally covered security for which a notice filing had been made with the Division, nor did the security qualify for an exemption from registration.

COUNT 24 SALE OF UNREGISTERED SECURITY, a Third Degree Felony, in Uintah County, State of Utah, in or about November 10, 2000, in violation of §61-1-7, and §61-1-21, Utah Code Annotated 1953, as amended, in that the defendant, **MICHAEL RICHARD SCHUBARTH**, a party to the offense, did willfully offer or sell any security to **Julie Pierce**, in Utah which was not registered with the Division, nor was the investment a federally covered security for which a notice filing had been made with the Division, nor did the security qualify for an exemption from registration.

COUNT 25 SALE OF UNREGISTERED SECURITY, a Third Degree Felony, in Uintah County, State of Utah, in or about September 6, 2000, in violation of §61-1-7, and §61-1-21, Utah Code Annotated 1953, as amended, in that the defendant, **MICHAEL RICHARD SCHUBARTH**, a party to the offense, did willfully offer or sell any security to **Arlene Thompson**, in Utah which was not registered with the Division, nor was the investment a federally covered security for which a notice filing had been made with the Division, nor did the security qualify for an exemption from registration.

COUNT 26 SALE OF UNREGISTERED SECURITY, a Third Degree Felony, in Uintah County, State of Utah, in or about December 15, 2000, in violation of §61-1-7, and §61-1-21, Utah Code Annotated 1953, as amended, in that the defendant, **MICHAEL RICHARD SCHUBARTH**, a party to the offense, did willfully offer or sell any security to **Arlene Thompson**, in Utah which was not registered with the Division, nor was the investment a federally covered security for which a notice filing had been made with the Division, nor did the security qualify for an exemption from registration.

COUNT 27 EMPLOYMENT OF UNLICENSED AGENT, a Third Degree Felony, in the county of Uintah, State of Utah, from in or about September 2000, through in or about December 2000, in violation of Utah Code Ann. §61-1-3 (1997) **MICHAEL RICHARD SCHUBARTH**, as a broker dealer, did willfully employ or engage **Amy J. Garcia**, an agent who was not licensed with the Utah Division of Securities.

COUNT 28 EMPLOYMENT OF UNLICENSED AGENT, a Third Degree Felony, in the county of Uintah, State of Utah, from in or about December 2000, through in or about December 2000, in violation of Utah Code Ann. §61-1-3 (1997) **MICHAEL RICHARD SCHUBARTH**, as a broker dealer, did willfully employ or engage **James E. Burns**, an agent who was not licensed with the Utah Division of Securities.

COUNT 29 EMPLOYMENT OF UNLICENSED AGENT, a Third Degree Felony, in the county of Uintah, State of Utah, from in or about June 2000, through in or about December 2000, in violation of Utah Code Ann. §61-1-3 (1997) **MICHAEL RICHARD SCHUBARTH**, as a broker dealer, did willfully employ or engage **Lloyd V. Wales**, an agent who was not licensed with the Utah Division of Securities.

COUNT 30 EMPLOYMENT OF UNLICENSED AGENT, a Third Degree Felony, in the county of Uintah, State of Utah, from in or about June 2000, through in or about December 2000, in violation of Utah Code Ann. §61-1-3 (1997) **MICHAEL RICHARD SCHUBARTH**, as a broker dealer, did willfully employ or engage **Nathan S. Hardman**, an agent who was not licensed with the Utah Division of Securities.

COUNT 31 PATTERN OF UNLAWFUL ACTIVITY, a Second Degree Felony, in Uintah County, State of Utah, from on or about June 16, 2000 through January 29, 2001 in violation of §76-10-1603, Utah Code Annotated 1953 as amended, in that the defendant, **MICHAEL RICHARD SCHUBARTH**, a party to the offense, received proceeds derived, directly or indirectly, from a pattern of unlawful activity as more fully defined in Counts 1 through 30 above, in which they participated as a principal, or they used or invested, directly or indirectly, any part of that income, or the proceeds of the income, or the proceeds derived from the investment or use of those proceeds, in the acquisition of any interest in, or establishment or operation of, any enterprise; through a pattern of unlawful activity acquired or maintained, directly or indirectly, any interest in or control of any enterprise; or were employed by, or associated with any enterprise and conducted or participated, whether directly or indirectly, in the conduct of that enterprise's affairs through a pattern of unlawful activity. The unlawful activity included three or more violations of securities fraud.

D

No Contest

No Contention

I understand that by pleading ~~guilty~~ I will be admitting ~~that I committed~~ the crimes listed above. I stipulate and agree that the following facts describe my conduct and the conduct of other persons for which I am criminally liable. These facts provide a basis for the court to accept my guilty pleas and prove the elements of the crime(s) to which I am pleading guilty:

- Count(s) 1 - 13 SECURITIES FRAUD
- Count(s) 13 - 26 SALE OF UNREGISTERED SECURITY
- Count(s) 27 - 30 EMPLOYMENT OF UNLICENSED AGENT
- Count 31 PATTERN OF UNLAWFUL ACTIVITY

Waiver of Constitutional Rights

D

I am entering these pleas voluntarily. I understand that I have the following rights under the constitutions of Utah and the United States. I also understand that if I plead ~~guilty~~ No Contest I will give up all the following rights:

D

Counsel: I know that I have the right to be represented by an attorney and that if I cannot afford one, an attorney will be appointed by the court at no cost to me. I understand that I might later, if the judge determined that I was able, be required to pay for the appointed lawyer's service to me.

D

I (have not) ~~(have)~~ waived my right to counsel. I certify that I have read this statement and that I understand the nature and elements of the charges and crimes to which I am pleading guilty. I also understand my rights in this case and other cases and the consequences of my guilty plea(s).

1

If I have not waived my right to counsel, my attorney is **Blake Nakamura**. My attorney and I have fully discussed this statement, my rights, and the consequences of my guilty plea(s).

2

Jury Trial. I know that I have a right to a speedy and public trial by an impartial (unbiased) jury and that I will be giving up that right by pleading guilty.

3

Confrontation and cross-examination of witnesses. I know that if I were to have a trial I would have the right to see and observe the witnesses in open court who testified against me and b) my attorney, or myself if I waived my right to an attorney, would have the opportunity to cross-examine all of the witnesses who testified against me in open court.

4

Right to compel witnesses. I know that if I were to have a trial, I could call witnesses if I chose to and I would be able to obtain subpoenas requiring the attendance and testimony of those witnesses. If I could not afford to pay for the witnesses to appear, the State would pay those costs.

5

Right to testify and privilege against self-incrimination. I know that if I were to have a trial, I would have the right to testify on my own behalf. I also know that if I chose not to testify, no one could make me testify or make me give evidence against myself. I also know that if I chose not to testify, the jury would be told that they could not hold my refusal to testify against me and if it were a non-jury trial, the judge would not hold my refusal against me.

8

Presumption of innocence and burden of proof.

I know that if I do not plead guilty, I am presumed innocent until the State proves that I am guilty of the charged crime(s). If I choose to fight the charges against me, I need only plead "not guilty," and my case will be set for a trial. At a trial, the State would have the burden of proving each element of the charge(s) beyond a reasonable doubt. If the trial is before a jury, the verdict must be unanimous, meaning that each juror would have to find me guilty.

8

I understand that if I plead ^{Not Guilty} ~~guilty~~, I give up the presumption of innocence and will ^{Not Committed} ~~be admitting that I committed~~ the crime(s) stated above.

8

Appeal.

I know that under the Utah Constitution, if I were convicted by a jury or judge, I would have the right to appeal my conviction and sentence. If I could not afford the costs of an appeal, the State would pay those costs for me. I understand that I am giving up my right to appeal my conviction if I plead guilty.

8

I know and understand that by pleading ^{No Costs} ~~guilty~~, I am waiving and giving up all the statutory and constitutional rights as explained above.

Consequences of Entering a Guilty Plea

No Costs Plea

A

Potential penalties.

I know the minimum and maximum sentence that may be imposed for each crime to which I am pleading guilty. I know that by pleading guilty to a crime that carries a mandatory penalty, I will be subjecting myself to serving a

mandatory penalty for that crime. I know my sentence may include a jail/prison term, fine, or both.

D I know that in addition to a fine, an eighty-five percent (85%) surcharge will be imposed. I also know that I may be ordered to make restitution to any victim(s) of my crimes, including any restitution that may be owed on charges that are dismissed as part of a plea agreement.

D **Consecutive/concurrent prison terms.** I know that if there is more than one crime involved, the sentences may be imposed one after another (consecutively), or they may run at the same time (concurrently). I know that I may be charged an additional fine for each crime that I plead to. I also know that if I am on probation or parole, or awaiting sentencing on another offense of which I have been convicted or which I have plead guilty, my guilty plea(s) now may result in consecutive sentences being imposed on me. If the offense to which I am now pleading guilty occurred when I was imprisoned or on parole, I know the law requires the court to impose consecutive sentences unless the court finds and states on the record that consecutive sentences would be inappropriate.

B **Trial judge not bound.** I know that any charge or sentencing concession or recommendation of probation or suspended sentence, including a reduction of the charges for sentencing, made or sought by either defense counsel or the prosecuting attorney are not binding on the judge. I also know that any opinions they express to me as to what they believe the judge may do are not binding on the judge.

5 (15)

Defendant's Certification of Voluntariness

I am entering this plea of my own free will and choice. No force, threats, of unlawful influence of any kind have been made to get me to plead guilty. No promises except those contained in this statement have been made to me.

I have read this statement, or I have had it read to me by an attorney, and I understand its contents and adopt each statement in it as my own. I know that I am free to change or delete anything contained in this statement, but I do not wish to make any changes because all of the statements are correct.

I am satisfied with the advice and assistance of my attorney.

I am 47 years of age. I have attended school through the 12th grade. I can read and understand the English language. If I do not understand English, an interpreter has been provided to me. I was not under the influence of any drugs, medication, or intoxicants which would impair my judgment when I decided to plead guilty. I am not presently under the influence of any drug, medication, or intoxicants which impair my judgment.

I believe myself to be of sound and discerning mind and to be mentally capable of understanding these proceedings and the consequences of my plea. I am free of any mental disease, defect, or impairment that would prevent me from understanding what I am doing or from knowingly, intelligently, and voluntarily entering my plea.

I understand that if I want to withdraw my ^{No Court}~~guilty~~ plea(s), I must file a written motion to withdraw my plea(s) within 30 days

after I have been sentenced and final judgment has been entered. I will only be allowed to withdraw my plea if I show good cause. I will not be allowed to withdraw my plea after 30 days for any reason.

 Plea bargain. My plea is a result of a plea bargain between myself and the prosecuting attorney. The promises, duties and provisions of this plea agreement, if any, are fully contained in this agreement and are as follows:

1. I hereby enter my plea of guilty to the charges of:

Count(s) 1 - 13 SECURITIES FRAUD

Count(s) 13 - 26 SALE OF UNREGISTERED SECURITY

Count(s) 27 - 30 EMPLOYMENT OF UNLICENSED AGENT

Count 31 PATTERN OF UNLAWFUL ACTIVITY

2. Upon acceptance of the ^{no contest} guilty plea, the State does hereby recommend that the Court place the plea in abeyance and not cause it to be entered upon the records for a period of **SIX (6) YEARS** on the following terms:

 a. Defendant hereby agrees to make himself available to report to the Court whenever requested to do so and further agrees to keep both his attorney and the Uintah County Attorney apprised as to his current mailing address at all times.

 b. Defendant hereby agrees to violate no laws of the United States, the State of Utah, or any municipality during the term of this agreement. In the event that Defendant is arrested, cited, or otherwise charged with any violation, Defendant

shall notify the County Attorney's office within 72 hours of said violation.

B c. Defendant shall pay restitution to named victims as listed in the information and victims listed herein which are not listed in the information as follows:

James Burns	\$50,000.00
Dusty Grothusen	\$11,000.00
Brian Jensen	\$14,000.00
Michael Nielson	\$15,000.00
Brian Skinner	\$35,000.00
Scott Sorenson	\$12,500.00
Olin Draney	\$9,100.00
Julie Peirce	\$7,500.00
Arlene Thompson	\$59,000.00
Darlene Burns	\$20,000.00
Mark Caldwell	\$5,000.00
Lisa Glick	\$10,000.00
Floyd Morton	\$5,000.00
Linette Rollins	\$10,000.00
Dale Kidd	\$10,000.00
Carol Dixon	\$1,450.00
TOTAL	\$274,550.00

AD d. Defendant shall make payments toward restitution in the amount of \$22,880.00 each six months. If payments in the amount of \$22,880.00 have not been paid, the defendant will appear in this court for a hearing to determine if he has substantially complied with the restitution payments. [The sole issue for review is whether there has been substantial compliance with the payment agreement. The defendant expressly waives any right he may have for the court to hear arguments concerning his ability to pay.]

W e. Defendant shall make full payment of restitution on or before November 26, 2008. Failure to pay the full amount of

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restitution on or before November 26, 2008 is a violation of this agreement and shall result in the entry on the record of all pleas.

B Full payment of restitution is an absolute term of this agreement. Failure by defendant to pay full restitution for any reason shall result in a violation of this agreement and result in the entry of all pleas on the record.

B That this matter come before the court for review on the second law and motion day in ~~November~~ ^{December} 2003, at 10:00 a.m. or at such other time as the Court may hereinafter set. If at that time the Court finds that all the restitution has been paid and there have been no other violations of the plea agreement, the defendant will be allowed to withdraw his plea of guilty to the charges of **(1-13) SECURITIES FRAUD, (14-26) SALE OF UNREGISTERED SECURITIES, (27-30) EMPLOYMENT OF UNLICENSED AGENT, and (31) PATTERN OF UNLAWFUL ACTIVITY**, and the court may then entertain a motion from the Defendant to dismiss these charges. The State will concur in such motion if there have been no violations of the agreement, the restitution has been paid and there are no violations pending.

B Count 26, SALE OF UNREGISTERED SECURITIES will then enter against the defendant. The defendant will then be sentenced on said charge. The State agrees not to argue for jail or prison time, or a fine in light of the substantial restitution in this matter. The State will argue for a term of probation not to exceed 1 year. The State will not object to a Motion by the defendant to reduce the charge to the next lower category only in the following circumstances:

- a. Defendant is placed on probation;
- b. Defendant is subsequently discharged from probation without violating any terms of his probation;
- c. Defendant violates no laws during the term of his probation and up until his motion to reduce the category of the offense; and
- d. Defendant successfully completes the term of his probation.

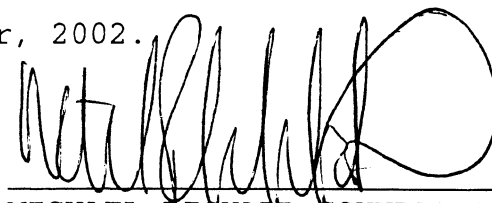
B If the defendant does not have all the restitution paid on or before ~~November~~ ^{DECEMBER} 26, 2003, but does have the restitution paid on or before ~~November~~ ^{DECEMBER} 26, 2008, then this matter will come before the court for review on the second law and motion day in November 2008, at 10:00 a.m. or at such other time as the Court may hereinafter set. If at that time the Court finds that all the restitution has been paid and there have been no other violations of the plea agreement, the defendant will be allowed to withdraw his plea of guilty to the charges of **(1-13) SECURITIES FRAUD, (14-26) SALE OF UNREGISTERED SECURITIES, (27-30) EMPLOYMENT OF UNLICENSED AGENT, and (31) PATTERN OF UNLAWFUL ACTIVITY**, and the court may then entertain a motion from the Defendant to dismiss these charges. The State will concur in such motion if there have been no violations of the agreement, the restitution has been paid and there are no violations pending.

19 Counts 23-26, SALE OF UNREGISTERED SECURITIES, will then enter against the defendant. The defendant will then be sentenced on said charges. The State agrees not to argue for jail or prison

time, or a fine in light of the substantial restitution in this matter. The State will argue for probation.

10 If, at any time during the term hereof, it comes to the attention of the Uintah County Attorney that Defendant has failed to comply with any of the terms of this agreement, the County Attorney may then go to the Court and request, by appropriate motion and affidavit, an Order to Show Cause requiring Defendant to appear and show cause why judgement for **(1-13) SECURITIES FRAUD, (14-26) SALE OF UNREGISTERED SECURITY, (27-30) EMPLOYMENT OF UNLICENSED AGENT, and (31) PATTERN OF UNLAWFUL ACTIVITY** should not be imposed and Defendant sentenced accordingly. Service of said Order to Show Cause may be had upon defense counsel and Defendant does hereby waive personal service upon him of any such order. If, after a hearing, the Court makes a finding that there is evidence that Defendant has failed to strictly comply with all terms of this agreement it shall immediately order imposition of the **(1-13) SECURITIES FRAUD, (14-26) SALE OF UNREGISTERED SECURITY, (27-30) EMPLOYMENT OF UNLICENSED AGENT, and (31) PATTERN OF UNLAWFUL ACTIVITY** judgement and Defendant shall be sentenced accordingly.

Dated this 26th day of November, 2002.

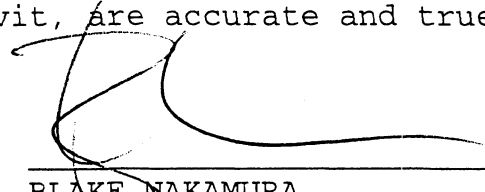


MICHAEL RICHARD SCHUBARTH
DEFENDANT

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Certificate of Defense Attorney


I certify that I am the attorney for MICHAEL RICHARD SCHUBARTH, the defendant above, and that I know he has read the statement or that I have read it to him. I have discussed it with him and believe that he fully understands the meaning of its contents and is mentally and physically competent. To the best of my knowledge and belief, after an appropriate investigation, the elements of the crime(s) and the factual synopsis of the defendant's criminal conduct are correctly stated; and these, along with the other representations and declarations made by the defendant in the foregoing affidavit, are accurate and true.



BLAKE NAKAMURA
ATTORNEY FOR DEFENDANT

Certificate of Prosecuting Attorney

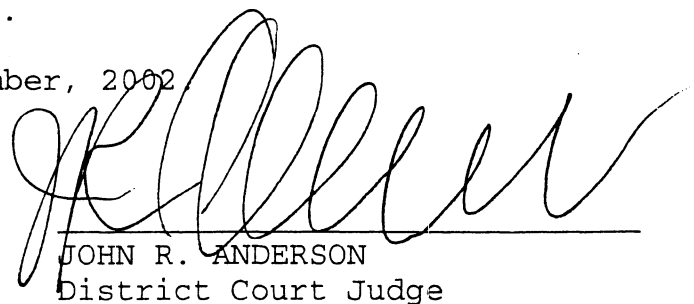
I certify that I am the attorney for the State of Utah in the case against **MICHAEL RICHARD SCHUBARTH**, defendant. I have reviewed this Statement of Defendant and find that the factual basis of the defendant's criminal conduct which constitutes the offense(s) is true and correct. No improper inducements, threats, or coercion to encourage a plea has been offered defendant. The plea negotiations are fully contained in the Statement and in the attached Plea Agreement or as supplemented on the record before the Court. There is reasonable cause to believe that the evidence would support the conviction of defendant for the offense(s) for which the plea(s) are entered and that the acceptance of the plea(s) would serve the public interest.


G. MARK THOMAS
PROSECUTION ATTORNEY

Order

The Court, having heard the representations made to it by counsel, having determined that Defendant is fully aware of his constitutional rights and of the purpose of this proceeding, accepts Defendant's pleas of guilty and finds that it is knowingly made and that he is under no undue stress or influence. The Court further approves the terms of the agreement set forth hereinabove and orders that Defendant's plea of guilty be placed in abeyance and that judgment not be entered against Defendant at this time but rather that imposition of judgment be stayed pursuant to the terms of the above set forth agreement until the _____ Law and Motion Calendar in May, 2003, or until such other time as the Court may order. Until such time as judgment is formally entered herein against Defendant, or charges are dismissed against Defendant, Defendant is ordered to comply with all terms of the above set forth agreement and failure to do so shall be dealt with accordingly to the terms thereof.

DATED this 26th day of November, 2002



JOHN R. ANDERSON
District Court Judge

ATTACHMENT B



In the Justice Court of Sparks Township, County of Washoe
STATE OF NEVADA

The State of Nevada

vs.
MICHAEL RICHARD SCHUBARTH

PLAINTIFF

DEFENDANT

COMPLAINT OF
MEGAN RACHOW
AGENCY NO. SPD 03-3155
DA NO. 311100

ATTORNEY FOR PLAINTIFF

ATTORNEY FOR DEFENDANT

CHARGING: CT. I. DRAWING AND PASSING A CHECK WITHOUT SUFFICIENT FUNDS WITH INTENT TO DEFRAUD, all misdemeanors.

DATE
2003

PROCEEDINGS

May 09	Complaint filed on the above charge having occurred on or about the 31st day of December, 2002. Summons issued to Sparks Police Department for Defendant to appear at Sparks Justice Court on the 2nd day of June, 2003, at 8:15AM.
June 02	Defendant failed to appear.
June 03	A BENCH warrant has been issued in the amount of \$500.00 CASH ONLY for FAILURE TO APPEAR FOR ARRAIGNMENT.

I hereby certify this is a true and correct copy of the Original in the Records of the Sparks Justice Court, Sparks, Washoe County, Nevada and that the Clerk of the Court is the custodian of the original record and that I am authorized to make this certification.

Janine Baker, Clerk, Sparks Justice's Court

By *Janine Baker* 6-17-03