

2004

# Michael Richard Schubarth v. State of Utah : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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MICHAEL RICHARD SCHUBARTH )

Appellant, )

v. )

STATE OF UTAH )

Appellee. )

) Case No. 20040361-CA

)

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APPELLANT'S REPLY BRIEF

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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 REQUEST

FILED  
UTAH APPELLATE COURTS  
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IN THE UTAH COURT OF APPEALS

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MICHAEL RICHARD SCHUBARTH            )  
    Appellant,                                )  
v.    )  
  )     Case No. 20040361-CA  
STATE OF UTAH                             )  
    Appellee.                                )

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REPLY BRIEF OF APPELLANT

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ARGUMENT I

In the defendant’s brief he argued that his plea in abeyance agreement should have been declared a misplea, because the terms of the agreement violated the express terms of Utah Code Annotated Section 77-2a-2(5). In support of his argument he cited two Utah cases State v. Kay, 717 P.2d 1294 (Utah 1986) and State v. Moss, 921 P.2d 1021 (Utah App. 1996).

In Moss, the court state that since the plea in abeyance agreement had violated the express terms of section 77-2a-3(7) this constituted obvious reversible error. In accordance with Moss, Mr. Schubarth has argued that his plea in abeyance agreement should be declared a misplea because it also violates the express terms of another statute Section 77-2a-2(5).

On the other hand, the appellee has argued in its brief that the defendant is not entitled to a misplea because any error committed at the trial court level was invited by the defendant.

Mr. Schubarth believes this to be an invalid argument because the conditions in his matter and the conditions of Moss are not distinguishable. In Moss, the parties negotiated a plea in abeyance agreement, both parties requested that the court except the agreement. Thus inviting the trial court to commit an error, because the terms of the agreement violated Section 77-2a-3(7). Id. When it was brought to the attention of the court that the plea in abeyance agreement violated Section 77-2a-3(7), the State of Utah moved the court for a misplea. Id. The trial court granted the misplea and the decision was affirmed on appeal. Id.

Like Moss, Mr. Schubarth negotiated a plea in abeyance agreement with the State of Utah. The agreement stated that Mr. Schubarth would be on probation for six years. This term violated Section 77-2a-2(5), thus inviting the trial court to commit an error. In this matter the error was brought to the attention of the trial court. R. 705, Tr. p. 8, line 20 & 21. At which time Mr. Schubarth requested a misplea. The request was denied.

The distinction between Moss and the present matter has to do with which party is requesting the misplea. In Moss, it was the State of Utah that requested the misplea. Id. In this matter, the defendant is requesting the misplea. In circumstances where both parties request that the court include in their plea in abeyance agreements terms that

expressly violate statutes, it would be a double standard to grant mispleas to the State of Utah and not to defendants.

## ARGUMENT II

### Point I

The State of Utah has the burden to prove a violation of a condition of probation by a preponderance of the evidence. State v. Hodges, 798 P.2d 270 (Utah App. 1990). In Mr. Schubarth's brief he questioned whether the State of Utah carried its burden to prove by a preponderance of the evidence that he violated a law in violation of his probation.

At the hearing the State of Utah did not introduce evidence that Mr. Schubarth was convicted of a bad check charge in Nevada. The only evidence they introduced was a docketing statement showing that Mr. Schubarth had been charged with writing a bad check and hearsay statements from Mr. Hines, stating that Mr. Schubarth had been charged, but that he did not know the results. R. 705, Tr.p.23, line 9-12.

In this matter, the State of Utah has the cart before the horse. It is generally, the practice of prosecutors to wait until a defendant is convicted of a crime before holding the hearing on the probation violation. Then the State of Utah can introduce the certified copy of the conviction. However, in this matter they did not wait, they proceeded before final disposition of the bad check charge. At best there was confusion as to the result of the charge in Nevada. The State of Utah introduced no evidence that the issue had been resolved. Mr. Schubarth's testimony was contradictory and indicated someone unfamiliar

with the system. He stated, that he pled not guilty. R. 705, Tr.p. 39, line 7-8. However, he indicated that some type of fine might have been paid by his attorney. R. 705, Tr.p.39, line 25.

The Appellee in its brief argues that the trial court correctly found that Mr. Schubarth committed the crime of passing a bad check, because Mr. Schubarth did not “explain why, having pled not guilty, he paid a fine and the case was closed.” Appellee’s brief page 13.

The appellee errors in arguing that the defendant did not properly explain his statements, it is not the defendant’s burden of proof. The state did not introduce any evidence that Mr. Schubarth had been convicted of passing a bad check. Therefore, if the court assumed that Mr. Schubarrth was convicted of passing a bad check, this was an error.

## POINT II

The appellee did not refute Mr. Schubarth’s second point and thus Mr. Schubarth asserts his argument without further explanation.

## ARGUMENT III

With regard to argument III, Both the appellant and the appellee are in agreement with regard to the law. Both parties have cited similar rules. For example, “When interpreting a contract, the intentions of the parties are controlling. See Central Florida Investments, Inc. v. Parkwest Assoc’s, 2002 UT 3, ¶ 12, 40 P. 3d 599.” Appellee’s Brief

p. 15. “This Court will ‘first look to the four corners of the agreement to determine the intentions of the parties.’ Id. (quoting Ron Case Roofing & Asphalt v. Blomquist, 773 P. 2d 1382, 1385 (Utah 1989))”. Appellee’s Brief p. 15. “In evaluating whether the plain language is ambiguous, [this court will] attempt to harmonize all of the contract’s provisions and all of its terms. Id.” Appellee’s Brief p. 15. ““ Where construction is called for, it is the duty of the court to interpret an ambiguity [in a manner that makes] the judgment more reasonable, effective, and conclusive, and [that] brings the judgment 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).” Appellant’s Brief p. 17. ““In addition, we construe any ambiguities in the order against the prevailing parties who drafted it . . .’ Id. “” Appellant’s Brief p. 17.

Applying the rules stated above, Mr. Schubarth believes his interpretation of the plea in abeyance agreement makes the most sense. First, it was the State of Utah that prepared the agreement so any ambiguities should be construed against them. Second, Mr. Schubarth believes it was the intentions of the parties, that Mr. Schubarth only had to pay a substantial amount of the restitution every six months. This interpretation gives meaning to the following sentence in the agreement: “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. 360 (Bolding and underlining added). Substantial compliance was all that required by the agreement as long

as the full restitution amount was paid by December 26, 2008. R. 361.

In fact, the appellee concedes that Mr. Schubarth's interpretation of the plea in abeyance agreement is correct. The appellee merely restates Mr. Schubarth's argument when the appellee states, "the 'substantial compliance' clause merely establishes what is to happen if defendant does not fulfill his obligation under the agreement. If defendant does not make the required payment timely, then the 'substantial compliance' clause provides that the defendant will not be in violation if he has 'substantially complied' with the restitution payments." Appellee's brief p. 16.

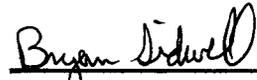
Mr. Schubarth agrees with this interpretation completely. The agreement stated that if Mr. Schubarth had not made the payment of \$22,880.00 within six months he was to be brought back to court to see if he had substantially complied with the agreement. Further, as the appellee has stated, if he had substantially complied then he would not be in violation of the agreement.

However, Mr. Schubarth believes this is not what occurred. The trial court did not determine or make any findings regarding whether Mr. Schubarth had substantially complied with the agreement. Instead, the trial court applied an all or nothing standard, determining that if the whole \$22,880.00 was not paid then he was in violation of the agreement, thus committing error. Therefore, Mr. Schubarth requests that this matter be remanded to the trial court for a correct review of whether he substantially complied with the agreement.

**CONCLUSION**

For the foregoing reasons, this Court should remand to the trial court for either the entry of a misplea, and a trial, or a new order to show cause hearing.

DATED this 8th day of December, 2004.

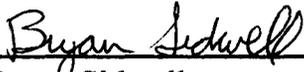


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**Bryan Sidwell**  
**Attorney for Appellant**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Appellant's reply brief was sent to Christopher D. Ballard at 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, by placing it in the U.S. mail, postage prepaid, on December 8, 2004.

  
\_\_\_\_\_  
Bryan Sidwell