

2004

Utah v. Rey De La Cruz Lopez : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

~~ORIGINAL~~

STATE OF UTAH, :
Plaintiff/Appellant :
v. :
REY DE LA CRUZ LOPEZ : Case No. 20040816-CA
Defendant/Appellee. :

BRIEF OF APPELLEE

The state is appealing from a trial court's sua sponte order withdrawing Defendant's guilty plea to two counts of forgery, third degree felonies, in violation of Utah Code Ann. § 76-6-501 (1999), in Third District Court in and for Salt Lake County, State of Utah, the Honorable Lee A. Dever, Judge, presiding.

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Established in 1965

UTAH APPEALS

OCT 19 2005

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Re: **State v. Lopez** (Case No. 20040816-CA)

Dear Ms. Collins:

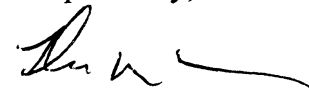
Pursuant to Rule 24(i), Utah Rules of Appellate Procedure, Appellee Rey De La Cruz Lopez hereby advises the Utah Court of Appeals of the following pertinent and significant authority that came to Appellee's attention after the briefs were filed:

Manning v. State, 2005 UT 61, 2005 Utah LEXIS 104 (concerning trial court's authority to reinstate time frame for filing direct appeal).

Burke v. Lewis, 2005 UT 44, ¶23, 2005 Utah LEXIS 82 (concerning trial court's inherent powers)

Manning pertains to the argument at Point II.A in the Reply Brief of Appellant, dated July 18, 2005. Burke pertains to the argument at Point II.C in the Response Brief of Appellee, dated April 14, 2005; and to the argument at Point II.C in the Reply Brief of Appellant.

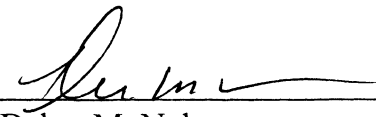
Respectfully,




Debra M. Nelson
Attorney

CERTIFICATE OF DELIVERY

I, DEBRA M. NELSON, hereby certify that I have caused to be hand-delivered eight copies of the foregoing to the Court of Appeals, 450 South State Street, Salt Lake City, Utah 84114-0230, and four copies of the foregoing to Karen Klucznik, Utah Attorney General's Office, Heber Wells Building, 160 East 300 South, 6th Floor, P. O. Box 140854, Salt Lake City, Utah 84114-0854, this 17 day of October, 2005.


Debra M. Nelson

DELIVERED to the Utah Court of Appeals and the Attorney General's Office as indicated above this 19 day of April, 2005.



IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

:

Plaintiff/Appellant

:

v.

:

REY DE LA CRUZ LOPEZ

:

Case No. 20040816-CA

Defendant/Appellee.

:

BRIEF OF APPELLEE

The state is appealing from a trial court's sua sponte order withdrawing Defendant's guilty plea to two counts of forgery, third degree felonies, in violation of Utah Code Ann. § 76-6-501 (1999), in Third District Court in and for Salt Lake County, State of Utah, the Honorable Lee A. Dever, Judge, presiding.

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE ISSUE, STANDARD OF REVIEW, PRESERVATION	1
RELEVANT STATUTORY AND RULE PROVISIONS	2
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	3
SUMMARY OF THE ARGUMENT	7
ARGUMENT	
POINT I. THE STATE DOES NOT HAVE A RIGHT TO APPEAL A TRIAL COURT'S SUA SPONTE VACATION OF A DEFENDANT'S PLEA.	8
POINT II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SETTING ASIDE MR. LOPEZ'S PLEA BEFORE A FINAL ORDER OF JUDGMENT HAD BEEN ENTERED.	10
A. UTAH CODE ANN. § 77-13-6 DOES NOT APPLY TO A TRIAL COURT'S SUA SPONTE DECISION TO SET ASIDE A GUILTY PLEA.	10
B. THE TRIAL COURT RETAINED JURISDICTION BECAUSE A FINAL SIGNED ORDER OF JUDGMENT WAS NEVER ENTERED.	16
C. INHERENT IN THE TRIAL COURT'S POWER AND AUTHORITY OVER ITS PROCEEDINGS IS A DUTY TO PROTECT A DEFENDANT'S CONSTITUTIONAL RIGHTS.	18

	<u>Page</u>
CONCLUSION	29
Addendum A: Text of Relevant Statutory and Rule Provisions	

TABLE OF AUTHORITIES

Page

CASES

<u>Boykin v. Alabama</u> , 395 U.S. 238 (1969)	20
<u>Bradbury v. Valencia</u> , 2000 UT 50, 5 P.3d 649	9
<u>Hall v. Department of Corrections</u> , 2001 UT 34, 24 P.3d 958	17
<u>Hinkins v. Santi</u> , 25 Utah 2d 324, 481 P.2d 53 (Utah 1971)	17
<u>Kearns-Tribune Corp. v. Wilkinson</u> , 946 P.2d 372 (Utah 1997)	18
<u>Ron Shepherd Ins., Inc. v. Shields</u> , 882 P.2d 650 (Utah 1994)	17
<u>State Farm Fire & Casualty Co. v. Sundance Dev. Corp.</u> , 2003 UT App 367, 485 Utah Adv. Rep. 32	11
<u>State v. Abeyta</u> , 852 P.2d 993 (Utah 1993)	13
<u>State v. Benvenuto</u> , 1999 UT 60, 983 P.2d 556	12
<u>State v. Canfield</u> , 917 P.2d 561 (Utah Ct. App. 1996)	13
<u>State v. Corwell</u> , 2003 UT App 261, 74 P.3d 1171, <u>cert.</u> <u>granted</u> , 2003 Utah LEXIS 140, 80 P.3d 152	21, 23
<u>State v. Curry</u> , 814 P.2d 1150 (Utah Ct. App. 1991)	16, 17
<u>State v. Cushing</u> , 2004 UT App 73, 8 P.3d 368	9
<u>State v. Dean</u> , 2004 UT 63, 95 P.3d 276	13, 14, 20
<u>State v. Gamblin</u> , 2000 UT 44, 1 P.3d 1108	11, 12
<u>State v. Gibbons</u> , 740 P.2d 1309 (Utah 1987)	20

	<u>Page</u>
<u>State v. Harrison</u> , 2001 UT 33, 24 P.3d 936	18
<u>State v. Heaton</u> , 958 P.2d 911 (Utah 1998)	19, 26
<u>State v. Horrocks</u> , 2001 UT App 4, 17 P.3d 1145	27
<u>State v. Humphrey</u> , 2003 UT App 333, 79 P.3d 960	11, 13
<u>State v. Jennings</u> , 875 P.2d 566 (Utah Ct. App. 1994)	12
<u>State v. Johnson</u> , 635 P.2d 36 (Utah 1981)	18
<u>State v. Kay</u> , 717 P.2d 1294 (Utah 1986)	27
<u>State v. King</u> , 2004 UT App 210, 95 P.3d 282	19
<u>State v. Lara</u> , 2003 UT App 318, 79 P.3d 951	25
<u>State v. Larsen</u> , 834 P.2d 586 (Utah Ct. App. 1992)	9
<u>State v. Maestas</u> , 2002 UT 123, 63 P.3d 621	11
<u>State v. McGee</u> , 2001 UT 69, 31 P.3d 531	13
<u>State v. Melo</u> , 2001 UT App 392, 40 P.3d 646	13
<u>State v. Morello</u> , 927 P.2d 646 (Utah Ct. App. 1996)	13
<u>State v. Moss</u> , 921 P.2d 1021 (Utah Ct. App. 1996)	27
<u>State v. Nielson</u> , 522 P.2d 1366 (Utah 1974)	18
<u>State v. Norris</u> , 2002 UT App 305, 57 P.3d 238	25
<u>State v. Ostler</u> , 2001 UT 68, 31 P.3d 528	13, 14
<u>State v. Pedockie</u> , 2004 UT App 224, 95 P.3d 1182, <u>cert.</u> <u>granted</u> , 106 P.3d 743	18, 19

	<u>Page</u>
<u>State v. Pena</u> , 869 P.2d 932 (Utah 1994)	26
<u>State v. Rojas-Martinez</u> , 2003 UT App 203, 73 P.3d 967	24, 25
<u>State v. Smith</u> , 812 P.2d 470 (Utah Ct. App. 1991)	20
<u>State v. Tarnawiecki</u> , 2000 UT App 186, 5 P.3d 1222	13
<u>State v. Tenangueno</u> , 2004 UT App 67 (unpublished memorandum decision)	13
<u>State v. Thorup</u> , 841 P.2d 746 (Utah Ct. App. 1992)	12, 13
<u>State v. Thurman</u> , 911 P.2d 371 (Utah 1996)	21, 25, 26
<u>State v. Todd</u> , 2004 UT App 266, 98 P.3d 46, <u>cert. granted</u> , _____	16, 17
<u>State v. Troyer</u> , 866 P.2d 528 (Utah 1993)	9
<u>State v. Turner</u> , 980 P.2d 1188 (Utah Ct. App. 1998)	2
<u>State v. Vasilacopulos</u> , 756 P.2d 92 (Utah Ct. App. 1988)	12
<u>State v. Virgin</u> , 2004 UT App 251, 96 P.3d 379, <u>cert.</u> <u>granted</u> , 106 P.3d 743	1, 2
<u>State v. Worthen</u> , 2005 UT App 135 (unpublished memorandum decision)	24
<u>State v. Wright</u> , 904 P.2d 1101 (Utah Ct. App. 1995)	16, 17
<u>U.S. v. Khalaf</u> , 116 F. Supp.2d 210 (D. Mass 1999)	18
<u>West Valley City v. Patten</u> , 1999 UT App 149, 981 P.2d 420	27
<u>Westenskow v. Holt</u> , 2001 UT 97, 37 P.3d 1070	9, 10

	<u>Page</u>
<u>Wickham v. Galetka</u> , 2002 UT 72, 61 P.3d 978	14

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

Utah Code Ann. § 77-13-6 (2003)	2, 8, 10, 11, 13, 14, 28
Utah Code Ann. § 77-18a-1 (2003)	1, 2, 9
Utah Code Ann. § 78-7-5 (2002)	2, 18
Utah R. App. P. 3	8
Utah R. Civ. P. 60	18
Utah R. Crim. P. 11	2, 20, 21, 23, 27, 28
Utah R. Crim. P. 22	17

OTHER AUTHORITIES

Utah House of Representatives Floor Debates, 55 th Legislature, General Session (February 28, 2003), Tape 2	15
Utah Senate Floor Debates, 55 th Legislature, General Session (March 4, 2003), Tape 2	15

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellant	:	
v.	:	
REY DE LA CRUZ LOPEZ	:	Case No. 20040816-CA
Defendant/Appellee.	:	

JURISDICTIONAL STATEMENT

The state is appealing from the trial court's sua sponte order withdrawing Defendant's guilty pleas to two counts of forgery, third degree felonies. The Utah Court of Appeals does not have jurisdiction over this appeal because it is improper pursuant to 77-18a-1 (2003). The state may not appeal the order in this case because the trial court did not "grant[] a motion to withdraw a plea of guilty" made by Defendant but instead acted on its own accord and withdrew the Defendant's guilty pleas. Therefore, this Court lacks jurisdiction to hear this appeal.

STATEMENT OF THE ISSUE, STANDARD OF REVIEW, PRESERVATION

Issue I. Whether the state is permitted to appeal a trial court's sua sponte order to set aside Defendant's guilty pleas?

Standard of Review: Whether this Court has jurisdiction over an appeal by the state is a question of law. See State v. Virgin, 2004 UT App 251, ¶9, 96 P.3d 379 cert

granted 106 P.3d 743.

Issue II. Whether the trial court abused its discretion in setting aside Mr. Lopez's plea before a final order of judgment had been entered ?

Standard of Review: This Court "review[s] a trial court's acceptance or rejection of a guilty plea under an abuse of discretion standard." State v. Turner, 980 P.2d 1188, 1189-90 (Utah Ct. App. 1998).

RELEVANT STATUTORY AND RULE PROVISIONS

The text of the following statutory provisions are in Addendum A:

Utah Code Ann. §77-18a-1 (2003);
Utah Code Ann. §77-13-6 (2003);
Utah Code Ann. § 78-7-5 (2002);
Utah R. Crim. P. 11.

STATEMENT OF THE CASE

On March 19, 2004, the state charged Mr. Lopez by Information with Communications Fraud, a second degree felony, or in the alternative, Theft by Deception, a second degree felony; and, Forgery, a third degree felony. R. 1-6, 9-14, 17-22. On August 19, 2004, Mr. Lopez entered into a plea agreement with the state to two counts of forgery, third degree felonies. R. 43-50; 102. The trial court conducted a colloquy with Mr. Lopez and accepted his guilty pleas. R. 102:9. The State and Mr. Lopez asked for sentencing that same day. R. 102:2, 9-10. The trial court orally sentenced Mr. Lopez to two concurrent terms of zero to five in the Utah State Prison. R. 102:12. The trial court stayed imposition of the prison terms, placed Mr. Lopez on probation with the court and

authorized his release to INS. R. 102:12. Restitution was order in the amount of \$63,958. R. 102:12.

The trial court never entered a final signed order of judgment. R. 51-52. Instead, on that same day, August 19th, the trial court entered a minute entry sua sponte setting aside Mr. Lopez's plea in this matter and setting a hearing for August 23, 2004. R. 51-52. On August 23rd, the trial court held a hearing and informed counsel that he had reconsidered acceptance of Mr. Lopez's plea. R. 103.

On September 21, 2004, the state filed a notice of appeal. R. 69-70. Based upon the court's own motion it entered an order setting Mr. Lopez's guilty pleas aside. R. 84-85. On October 19, 2004, the state filed an amended notice of appeal. R. 86-87.

STATEMENT OF THE FACTS

On August 19, 2004, Mr. Lopez entered into a plea agreement with the state. R. 43-50; 102:2. In the plea agreement, the state amended the communications fraud count to a forgery in exchange for Mr. Lopez's agreement to plead guilty to two counts of forgery. R. 43-50. The trial court held a hearing on the plea agreement. R. 102. A Spanish interpreter was present for Mr. Lopez. R. 102:2. The state informed the court of the plea agreement and stated "[t]he Court should be aware that we're going to ask that the Court impose sentence today." R. 102:2. The trial court then conducted a plea colloquy regarding the rights Mr. Lopez would be giving up by entering into a plea agreement with the state and pleading guilty. R. 102:4-7.

During the plea colloquy, the trial court asked Mr. Lopez if he had "reviewed th[e plea] form that your attorney has in front of you?" R. 102:7. Mr. Lopez responded, "yes." R. 102:7. The trial court then inquired whether the form was "printed in the Spanish language?" R. 102:7. Defense counsel answered that it was an English form, "but we went through it carefully with Mr. Lopez." R. 102:7. The trial court then asked Mr. Lopez if he had any questions about what he was "told by the interpreter about what [the plea] document says?" R. 102:8. The trial court then inquired why a Spanish form was not used. R. 102:8. Defense counsel answered that although he had both forms available, he filled out the English form "on accident" which is why they went through the English form in detail. R. 102:8.

Mr. Lopez then pled guilty to both felony counts. R. 102:8-9. The trial court accepted Mr. Lopez plea and asked what his desire was in regard to sentencing. R. 102:9. Defense counsel stated that he discussed sentencing with Mr. Lopez and it was Mr. Lopez's desire to waive the minimum time for sentencing. R. 102:9. The trial court asked why Mr. Lopez wanted to waive the minimum time for sentencing. R. 102:9. Defense counsel then stated that he'd "ask the Court to sentence him today, and I think that the State joins with me in this, basically just to turn the case over or not give him any more time, release him to the immigration customs enforcement officials for deportation to Mexico." R. 102:10. The trial court then asked Mr. Lopez whether he understood if he was sentenced today he would be giving up the right to withdraw his guilty plea. R.

102:11. Mr. Lopez responded, "yes." R. 102:11.

Mr. Lopez waived the minimum time for sentencing. R. 102:11. The trial court asked Mr. Lopez if he understood that if he was released to INS and deport, he would be prohibited from coming back to this country without the INS's permission. R. 102:11. Mr. Lopez responded, "yes." R. 102:11. The trial court then imposed two concurrent sentences on Mr. Lopez of zero to five years. R. 102:12. The trial court stayed imposition of the prison term and put Mr. Lopez on probation with the court and authorized his release to INS. R. 102:12.

A signed final order of judgment was never entered by the trial court. Instead, on the August 19th change of plea minute entry the trial court sua sponte reconsidered the acceptance of Mr. Lopez's plea and entered that it was setting the plea aside pending a hearing on the matter. R. 51-53. The trial court held a hearing on its sua sponte decision to set aside Mr. Lopez's plea. R. 103. The state stated to the trial court that it was "not entirely sure what the current status" of the case was. R. 103:2. The trial court then informed counsel of the following:

The current status is . . . that on Friday¹ the record will indicate that Mr. Rey de la Cruz Lopez entered a plea to two third degree felonies, forgery charges. It's been brought to the Court's attention - - in fact, we discussed this at the time that the plea form itself was in English and not in Spanish. Mr. de la Cruz is not fluent in English. This form was translated for him, but based upon information the Court received, I have serious concerns that

¹Defense counsel later clarified for the record that the plea hearing took place on Thursday. R. 103:4.

Mr. Lopez understands the ramifications of what he is doing and what a plea to these charges means to him.

Based upon that understanding I've asked you to appear back here today because it might be appropriate for the Court to set aside his plea in this case and allow this matter to proceed. Mr. Lopez receiving, I believe, information clearly in Spanish that he can understand the ramifications, the plea here will eliminate the fact that he will be able to spend any time with his family for the rest of his life.

R. 103:2-3.

The state argued that Mr. Lopez knew that the "plea meant that he would be deported" but that does not "mean[] that he can't see his family for the rest of his life.

Clearly he can travel to and from once he follows the correct legal procedure . . ." R.

103:3. Defense counsel admitted that his knowledge of immigration law was limited but agreed it would be wise to have Mr. Lopez review the Spanish plea form to fully

understand the consequences of his plea. R. 103:4-5. Potential conflict counsel also

noted that his understanding of immigration law was limited but in order to represent his criminal clients he understood that once convicted of a felony a person is excludeable. R.

103:6. The state argued that Mr. Lopez waived his rights when sentenced and cannot

come back and request to be resentenced. R. 103:5. The court clarified for counsel that

the matter was before the court on its own motion and not because Mr. Lopez made a

motion. R. 103:5. The court expressed its concerns about Mr. Lopez's understanding of

the plea entered into stating:

I have concerns about whether or not Mr. Lopez fully understood what was going on. One of the concerns I have is is that it's always easy to say, "I

translate things for people and I tell them," but some people do not understand as well when it's translated and it's said to them orally things that they could have read that were printed in their own language. I think that's a critical thing here to think about whether or not he would be able to read this and we'd have a different effect here. We may not have, but I'm concerned about the long-term consequences here to Mr. Lopez, and I want him to be clear as to what they are.

R. 103:5-6.

Conflict counsel then told the court that Mr. Lopez wasn't sure what he wanted to do in regard to allowing the Court to set aside his guilty plea. R. 103:7 Counsel also informed the court that he had not discussed whether Mr. Lopez completely understood the plea form but that he would give him a Spanish form and "see if he can understand and read that and see if he has any further questions concerning his entry of plea. R. 103:7. The trial court then set aside Mr. Lopez plea and allowed him a week to decide whether he wanted to proceed with the change of plea. R. 103:7-8. The trial court directed counsel that a Spanish plea form is to be presented to Mr. Lopez so he can "have an opportunity to read it himself." R. 103:8. The trial court stated that once Mr. Lopez has had an opportunity to do that the court would "have an understanding that he fully understands the full ramifications of what he's doing." R. 103:8. The state appealed. R. 69-70; 86-87.

SUMMARY OF THE ARGUMENT

Because there is no statutory provision allowing the state to appeal from a trial court's sua sponte decision to set aside a guilty plea, this Court is without jurisdiction to

hear the state's appeal. Even if this Court determines that it does have jurisdiction to review this case, the trial court had discretion and retained jurisdiction to sua sponte set aside Mr. Lopez's guilty plea based on its belief that his plea was not knowingly entered. It is clear from the plain language and legislative history of Utah Code Ann. §77-13-6 that it does not apply to limit a trial court's discretion to sua sponte decline to enter a guilty plea as a conviction but only to provide limitation to a defendant seeking to withdraw his guilty pleas.

The trial court has inherent power and authority to govern the proceedings it presides over and can invoke its powers to amend its orders to conform to the law and justice. The trial court also has a duty to jealously protect the constitutional rights of criminal defendants. A trial court is in the best position to determine whether a defendant's rights have been observed. Because of the heavy burden placed on trial courts to ensure a defendant's constitutional rights are complied with, the trial court had discretion to sua sponte vacate Mr. Lopez's guilty plea based on its determination that he did not make a knowing guilty plea.

ARGUMENT

POINT I. THE STATE DOES NOT HAVE A RIGHT TO APPEAL A TRIAL COURT'S SUA SPONTE VACATION OF A DEFENDANT'S PLEA.

The State seeks to appeal the trial court's sua sponte decision to set aside Mr. Lopez's plea. However, the state's ability to appeal in a criminal case is limited. Utah Rule of Appellate Procedure 3 (a) allows appeals to be taken to the appellate court from a

district court's final order or judgment. Id. "For an order to constitute a final judgment, it must end the controversy between the litigants. In other words, to be considered a final order, the trial court's decision must dispose of the claims of all parties." Westenskow v. Holt, 2001 UT 97, ¶12, 37 P.3d 1070 (internal citation omitted). In this case, the trial court's "order setting aside [Mr. Lopez's] guilty plea" was not a final appealable order because it did not "dispose of the claims of all [the] parties." Id.; R. 84. Instead, the parties have been put back in their original position and the original criminal charges against Mr. Lopez have been reinstated and are pending in trial court. R. 95-98.

While it is possible for "orders . . . that are not final [to] be appealed if such appeals are statutorily permissible," this appeal does not fall under such an exception. Bradbury v. Valencia, 2000 UT 50, ¶12, 5 P.3d 649. Utah Code Ann. § 77-18a-1 (g) only allows the state to appeal from "an order of the court granting a motion to withdraw a plea of guilty or no contest." Id. The statute contemplates a trial court's grant of a motion made by a defendant to withdraw his guilty plea. In this case, Mr. Lopez never made a motion to withdraw his guilty plea, therefore, the court did not "grant[]" a motion allowing the state to appeal. See State v. Troyer, 866 P.2d 528 (Utah 1993) (State has no right to appeal except as expressly provided by statute); State v. Cushing, 2004 UT App 73, ¶13, 88 P.3d 368 ("prosecution's ability to appeal is substantially narrower, by legislative design, than that of a defendant."); State v. Larsen, 834 P.2d 586, 588 (Utah Ct. App. 1992) (State's has no right to appeal except as expressly provided by statute).

Rather, the trial court sua sponte set aside Mr. Lopez's guilty plea after determining that he did not knowingly enter his plea. R. 51, 55; 103.

Therefore, the state is precluded from appealing the trial court's order and this court is without jurisdiction to hear it. See Westenskow, 2001 UT 97 at ¶10 (appellate court "does not have jurisdiction over an appeal unless it is taken from a final [order]").

POINT II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SETTING ASIDE MR. LOPEZ'S PLEA BEFORE A FINAL ORDER OF JUDGMENT HAD BEEN ENTERED.

It was within the trial court's discretion to sua sponte set aside Mr. Lopez's guilty plea based on its belief that his plea was not knowingly entered. The trial court retained jurisdiction to set aside the guilty plea after orally imposing sentence because the trial court (A) was not constrained by the limitations of Utah Code Ann. § 77-13-6; (B) had not entered a final signed judgment; and (C) had inherent power and authority to ensure that Mr. Lopez's constitutional rights were protected during the proceedings it governed.

A. UTAH CODE ANN. §77-13-6 DOES NOT APPLY TO A TRIAL COURT'S SUA SPONTE DECISION TO SET ASIDE A GUILTY PLEA.

Utah Code Ann. § 77-13-6 governs when a defendant can make motion to the trial court to have his guilty plea withdrawn. Id. However, the state misinterprets the limitations and guidelines of section 77-13-6 as applying to parties other than a defendant. See Appellant Brief 7-10. Indeed, the purpose of section 77-13-6 is clear from the statute's plain language that the process set out for withdrawing a guilty plea only applies to defendants. Because the plea statute does not apply to a trial court's decision to set

aside a guilty plea, the trial court retained jurisdiction over the criminal proceedings.

"When interpreting a statute, this [C]ourt looks first to the statute's plain language to determine the Legislature's intent and purpose" . . . reading "the plain language of the statute as a whole" State Farm Fire & Casualty Co. v. Sundance Dev. Corp., 2003 UT App 367, ¶4, 485 Utah Adv. Rep. 32 (citations omitted). The court's purpose when interpreting statutory language is "to render all parts [of the statute] relevant and meaningful,' and . . . presume the legislature use[d] each term advisedly and . . . according to its ordinary meaning." State v. Maestas, 2002 UT 123, ¶52, 63 P.3d 621 (alterations in original) (citations omitted). In doing so, the court seeks to "avoid interpretations that will render portions of a statute superfluous or inoperative.'" Id. (citations omitted). Utah Code Ann. § 77-13-6 deals with withdrawal of pleas made by a defendant. The plain language of the statute clarifies that the purpose of section 77-13-6 is to inform a defendant under what conditions and time frame a guilty plea can be withdrawn. For example, section 77-13-6 (a) sets forth that "a plea of guilty . . . may be withdrawn only upon leave of the court and a showing that it was not knowingly and voluntarily made. In case law dealing with motions to withdraw a guilty plea for being unknowing and involuntary the motions have always been made by the defendant and courts have placed a heavy burden on the defendant of making a showing that the plea was not knowing and voluntary. See State v. Humphrey, 2003 UT App 333, 79 P.3d 960 (motion initiated by defendant to withdraw guilty plea, claiming not voluntarily entered); State v. Gamblin,

2000 UT 44, 1 P.3d 1108 (motion initiated by defendant to withdraw guilty plea, claiming not knowingly or voluntarily entered); State v. Benvenuto, 1999 UT 60, 983 P.2d 556 (same); State v. Jennings, 875 P.2d 566 (Utah Ct. App. 1994) (same); State v. Thorup, 841 P.2d 746 (Utah Ct. App. 1992) (same); State v. Vasilacopulos, 756 P.2d 92 (Utah Ct. App. 1988).

Subsection (b) states in part: "A request to withdraw a plea of guilty or no contest, . . . , shall be made by motion before sentence is announced. Sentence may not be announced unless the motion is denied." Id. In this section the statute addresses the time frame in which a defendant must make a motion to have his guilty plea withdrawn. In State v. Abeyta, 852 P.2d 993 (Utah 1993), the Court had to determine whether the amendment to section 77-13-6, requiring the withdrawal of a guilty plea to be made within 30 days after the entry of the plea, applied to the defendant. Id. at 995. The supreme court determined that the amendment could not apply retroactively because it was substantive in nature in that it "enlarge[d], eliminate[d], or destroy[ed] a vested right." Id. The Court explained its determination specifically noting that changes to this statute affect defendants. Id. The amendment to the plea statute in this case, "was amended in 1989 to require a defendant to file a motion to withdraw a guilty plea within thirty days after the entry of the plea. We have held that failure to do so extinguishes a defendant's right to challenge the validity of the guilty plea on appeal." Id. (emphasis added) (noting that "the plea statute limits a defendant's right to withdraw his or her guilty

plea to thirty days after entry of the plea" (emphasis added)). This Court has also clarified that "[t]he plea statute limits a defendant's right to withdraw a guilty plea to a specific time." State v. Tenangueno, 2004 UT App 67 (unpublished memorandum decision).

Further evidence that the plea statute strictly applies to defendants can be found in the state's own argument. All the case law cited by the state regarding the statute's time limitation involved motions made by defendants to withdraw their guilty pleas. See Appellant Brief 7-9. Indeed, Appellee was unable to find any case law where anyone but the defendant has filed a motion to withdraw a guilty plea under this statute. See State v. Dean, 2004 UT 63, 95 P.3d 276 (defendant made motion under statute to withdraw guilty plea); State v. McGee, 2001 UT 69; 31 P.3d 531 (same); State v. Abeyta, 852 P.2d 993 (Utah 1993) (same); State v. Humphrey, 2003 UT App 333, 79 P.3d 960 (same); State v. Melo, 2001 UT App 392, 40 P.3d 646 (same); State v. Ostler, 2001 UT 68, 31 P.3d 528 (same); State v. Tarnawiecki, 2000 UT App 186, 5 P.3d 1222 (same); State v. Canfield, 917 P.2d 561 (Utah Ct. App. 1996); State v. Morello, 927 P.2d 646 (Utah Ct. App. 1996) (same); State v. Thorup, 841 P.2d 746 (Utah Ct. App. 1992) (same).

Finally, the only remedy made available in the statute for exceeding the time period specified in (b) is one that may only be pursued by a defendant. See Utah Code Ann. § 77-13-6 (2)(c). Subsection (2)(c) states, "[a]ny challenge to a guilty plea not made within the time period specified in Subsection (2)[(b)] shall be pursued under Title 78, Chapter 35a, Post-Conviction Remedies Act, and Rule 65C, Utah Rules of Civil Procedure." Id.

Under the Post-Conviction Remedies Act only "a person who has been convicted and sentenced for a criminal offense may file a civil action for post-conviction relief to vacate or modify the conviction or sentence." Wickham v. Galetka, 2002 UT 72, ¶9, 61 P.3d 978.

The plain language of the statute illustrates that its purpose is to inform defendants about the procedures available and limitations on withdrawing a guilty plea and is not meant to serve as a limitation on a trial court's discretion or jurisdiction in setting a plea aside sua sponte. Utah case law identifies that motions to withdraw guilty pleas made under this statute are "a privilege, not a right" given to defendants with the determination of the motion being "left to a trial court's sound discretion." Dean, 2004 UT 63 at ¶11. The language of the statute and the case law stemming from it is unambiguous and clearly indicates that its application is meant to proscribe limitations only on a defendant who makes a motion to withdraw a guilty plea.

However, "[i]f [this Court] find[s] the provision ambiguous . . . [it] then seek[s] guidance from the legislative history and relevant policy considerations." Ostler, 2001 UT 68 at ¶7. The legislative history of Utah Code Ann. §77-13-6 provides further support that the statute is meant to apply only to a defendant. When Representative K. Bryson introduced her bill proposing to rewrite Subsection (2)(a) and (2)(b) of Utah Code Ann. § 77-13-6, she explained the amendments purpose stating:

This bill is actually the result of extensive negotiations between [the Statewide Association of Public Attorneys] SWAP and the courts, and is

now supported by both. [It] [c]orrects two problems in our current law governing the withdrawal of pleas. First, of all, the current statute permits the withdrawal of a guilty plea only upon good cause shown. This is more . . . as we go through this, the constitution . . . what the constitution requires is that the plea be made knowingly and voluntarily. And rule 11 should actually create a safe harbor and not be the standard by which withdrawal is determined. Two thirty-eight would correct some problems by permitting defendants to withdraw their pleas only on a showing that the plea was not knowing and voluntary. It's a constitutional standard and the standard on post-conviction challenges. As well, 238 would correct problems by permitting defendants to withdraw their pleas before sentencing but not after.

Tape 2 of Utah House of Representatives Floor Debates, 55th Legislature, General Session (February 28, 2003) (statement of Rep. K. Bryson discussing H.B. 238) (emphasis added).

Senator Gladwell's discussion of the bill in the senate debate, as quoted by the state, lends additional support that this section was enacted to address concerns about when a defendant can seek to have his guilty plea withdrawn. The state even bracketed the use of the word "defendant" lending further emphasis that this statute applies only to defendants desiring to withdraw their guilty pleas. See Appellant's Brief 8 n.1. The state quoted Senator Gladwell's explanation of the amendments to this section who stated:

The plain language of the statute currently states that [defendant's] must withdraw the plea within 30 days after the entry of the plea. It takes about six weeks from the time a person enters a plea until they are sentenced, so the statute has always anticipated that a person would enter a plea knowingly and voluntarily and then the plea would take effect prior to sentencing so that he couldn't withdraw it unless there was some showing of lack of voluntariness or that he didn't enter it knowingly. . . .

quoting Appellant Brief 8 n.1 (emphasis added) (quoting Tape 2 of the Utah Senate Floor Debates, 55th Legislative, General Session (March 4, 2003) (statement of Sen. Gladwell

discussing H.B. 238)).

In sum, the plain language of the plea statute is unambiguous and its intent was not to serve as a limitation on a judge's ability to sua sponte set aside a guilty plea. Instead, the statute's purpose is to detail the circumstances and time frame under which a defendant can make a motion to withdraw a guilty plea. Such an interpretation is consistent with Utah case law. Even if the Court finds the language ambiguous, the legislative history clarifies that this statute and its limitations are meant to apply only to defendants. Because this statute does not apply to a trial court's determination to sua sponte vacate a guilty plea, it retained jurisdiction to set aside Mr. Lopez's guilty plea.

B. THE TRIAL COURT RETAINED JURISDICTION BECAUSE A FINAL SIGNED ORDER OF JUDGMENT WAS NEVER ENTERED.

"It is the law of this state, as announced in State v. Curry, 814 P.2d 1150 (Utah Ct. App. 1991) (per curiam), that a sentence is not entered until it has been reduced to writing and signed by the court." State v. Todd, 2004 UT App 266, ¶15, 98 P.3d 46 (citations and quotations omitted) cert granted (Utah February 10, 2005). In Todd, this Court discussed Curry and State v. Wright, 904 P.2d 1101 (Utah Ct. App. 1995) which determined that a sentence is not final until it has been written and signed by the court. Id. at ¶¶ 15-18.

Curry involved a defendant whose sentence was orally pronounced by the trial court, after which he filed a motion to set aside the sentence and requested a ninety-day evaluation. A hearing was held, and the court stated that it would not sign an order implementing the previously announced sentence and instead ordered a ninety-day evaluation of the defendant. Following the ninety-day evaluation, the court again pronounced its sentence upon defendant. However, this time the sentences were to run

consecutively rather than concurrently, as had been previously announced. The defendant appealed, arguing that his due process rights were violated when the trial court imposed a more severe sentence than what had been first announce.

On appeal, this court held that ‘the oral statement from the court regarding defendant’s sentence was not reduced to writing, and thus defendant’s sentence was not entered until’ after the second sentencing hearing when the sentence was actually reduced to writing. In reaching its conclusion in Curry, this court followed Hinkins v. Santi, 25 Utah 2d 324, 481 P.2d 53 (Utah 1971) which held that ‘a judgment and sentence is not final and appealable where the court orally finds defendant guilty and sentences him but fails to enter written findings of fact and a judgment.’ Curry, 814 P.2d at 1151 (citing Hinkins, 481 P.2d at 54).

Todd, 2004 UT App 266 at ¶¶ 15-16.

This court came to a similar conclusion in Wright noting that the defendant in that case "had ‘only been sentenced once for the crime,’ i.e., when the written sentencing order was entered. Id. at ¶17. Therefore, in a Utah criminal case, a final judgment occurs when the trial court enters the written judgment of conviction, including the sentence, into the record." State v. Todd, 2004 UT App 266, ¶10 n.1, 98 P.3d 46; see Utah R. Crim. P. 22 (c); Hall v. Department of Corrections, 2001 UT 34, ¶12, 24 P.3d 958 ("[I]t is settled law that a trial court is free to reassess its decision at any point prior to entry of a final order or judgment." (quoting Ron Shepherd Ins., Inc. v. Shields, 882 P.2d 650, 654 (Utah 1994))).

Because the plea statute does not apply to a trial court and the trial court had not entered a final signed judgment, it retained jurisdiction to set aside Mr. Lopez’s guilty

plea.²

C. INHERENT IN THE TRIAL COURT'S POWER AND AUTHORITY OVER ITS PROCEEDINGS IS A DUTY TO PROTECT A DEFENDANT'S CONSTITUTIONAL RIGHTS.

A trial court has inherent power and authority to govern the criminal proceedings it presides over. See State v. Harrison, 2001 UT 33, ¶6, 24 P.3d 936 ("The trial judge has broad latitude to control and manage the proceedings and preserve the integrity of the trial process." (citations omitted)); Kearns-Tribune Corp. v. Wilkinson, 946 P.2d 372, 376 n.3 (Utah 1997) (court has "inherent power to judicially conduct its affairs"); State v. Nielson, 522 P.2d 1366, 1369 (Utah 1974) ("[T]he trial court has control of the proceedings before it and can invoke its inherent powers to prevent any such abuses." (dissent)); Utah Code Ann. 78-7-5 (8) (trial courts are given statutory authority to "amend and control its process and orders to conform to law and justice")

Inherent in a trial court's power is its duty to protect a criminal defendant's constitutional rights. For example, in State v. Pedockie, 2004 UT App 224, ¶35-40, 95

²Even had a final judgment been entered the trial court had procedural remedies available allowing it to set aside a plea. For example, a writ of coram nobis and Rule 60 (b) of the Utah Rule of Civil Procedure are available to trial courts to withdraw the guilty plea. See State v. Johnson, 635 P.2d 36, 37-38 (Utah 1981) (coram nobis appropriate where lawyer misled defendant about right to appeal); U.S. v. Khalaf, 116 F. Supp.2d 210, 213-15 (D. Mass 1999) (granting writ of coram nobis to vacate guilty plea where defense counsel wrongly advised defendant about the law on deportation and its effects on defendant); Utah R. Civ. P. 60 (b) (allows a court "in the furtherance of justice relieve a party . . . from a final judgment, order, or proceeding for . . . any . . . reason justifying relief from the operation of judgment.).

P.3d 1182, cert. granted, 106 P.3d 743, this Court found that the trial court failed to secure the defendant's right to counsel even after the defendant had gone through several public defenders and private attorneys. Id. This Court emphasized that the trial court has a duty to "jealously protect[]" a defendant's fundamental constitutional rights, in this case the right to counsel:

the right to have the assistance of counsel in a criminal trial is a fundamental constitutional right which must be jealously protected by the trial court. . . . "The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused - - whose life or liberty is at stake - - is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused."

Id. at ¶40 (quoting State v. Heaton, 958 P.2d 911, 917 (Utah 1998)).

This Court concluded that even though this Court did "not wish to reward [the] defendant's dilatory conduct," given the importance of the right to counsel, it was unwilling to find a waiver of counsel where the trial court failed to ascertain whether the defendant knowingly and intelligently waived this fundamental right. Id. In State v. King, 2004 UT App 210, 95 P.3d 282, the defendant argued that the trial court failed to fulfill its duty to investigate and eliminate potential juror bias, which had surfaced during voir dire. Id. This Court agreed, finding that a trial court had a "duty to detect and investigate the potential for partiality so that counsel has the opportunity to intelligently and effectively exercise challenges to jurors." Id. at ¶25. In King, even though defense counsel did not challenge the juror in question, given the fundamental constitutional right

to an impartial jury, this Court held that the trial court's duty was "independent" of defense counsel's duty to object. Id.

Similarly, in accepting guilty pleas, trial courts also have a heavy burden placed upon them to ensure that a defendant's waiver of his constitutional rights is made knowingly and voluntarily. See State v. Gibbons, 740 P.2d 1309, 1312 (Utah 1987); Utah R. Crim. P. 11. Under Utah Rule of Criminal Procedure 11(e) a trial court is permitted to "refuse to accept a [defendant's] plea of guilty." Id. More importantly, Rule 11 mandates that a trial court "shall not accept" a guilty plea until it is assured that it has strictly complied with the constitutional requirements of the rule. Id.; State v. Smith, 812 P.2d 470, 476 (Utah Ct. App. 1991) ("a trial court errs when it refuses to allow the withdrawal of a guilty or no contest plea that was not entered in strict compliance with Rule 11 . . .").

The purpose of Rule 11 is to "ensure that defendants know their rights and understand the basic consequences of their decision to plead guilty." State v. Dean, 2004 UT 63, ¶9, 95 P.3d 276.

Rule 11 (e) squarely places on trial courts the burden of ensuring that constitutional and Rule 11 (e) requirements are complied with when a guilty plea is entered. The basis for that duty is found in Boykin v. Alabama, 395 U.S. 238 (1969), where the United States Supreme Court stated: "What is at stake for an accused facing [punishment] demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequences."

Gibbons, 740 P.2d at 1312.

Because compliance with the constitutional and Rule 11 (e) requirements is so

important, "the law places the burden of establishing compliance with those requirements on the trial judge." Id. at 1313. Under Rule 11's strict compliance standard, a trial court must "personally establish that the defendant's guilty plea is truly knowing and voluntary." State v. Thurman, 911 P.2d 371, 372 (Utah 1996). A trial court does not sustain its burden of ensuring that a defendant's fundamental constitutional rights have been observed by "assum[ing] that defense attorneys make sure that their clients fully understand the contents of the affidavit." Id. Therefore, it is clear that "[t]he duty to ensure that defendants know and understand the rights they are surrendering when pleading guilty rests not on the parties, but on the trial court." State v. Corwell, 2003 UT App 261, ¶18, 74 P.3d 1171 cert granted 2003 Utah LEXIS 140, 80 P.3d 152.

In this case, the trial court's concerns regarding the guilty plea are evident from the record. During the plea colloquy, the trial court asked Mr. Lopez a series of questions about whether he understood the rights he was giving up. R. 102:4-7. Mr. Lopez simply responded "yes" through an interpreter to each of the trial court's inquiries. R. 102:4-7. The trial court then asked Mr. Lopez whether he had reviewed the plea form that his attorney had in front of him. R. 102:7. Mr. Lopez answered "yes." R. 102:7. The court then inquired whether the form was printed in Spanish. R. 102:7. Defense counsel informed the court that the plea form was not in Spanish but that counsel had gone "through it carefully with Mr. Lopez." R. 102:7. The court inquired of Mr. Lopez whether that was correct. R. 102:7. Mr. Lopez responded "yes." R. 102:7.

The court went on to ask Mr. Lopez whether he had any questions about what he "was told by the interpreter about what that document says." R. 102:8. Mr. Lopez responded "no." R. 102:8. After Mr. Lopez signed the plea form, the court again inquired into the reason a Spanish plea form was not used. R. 102:8. Defense counsel tried to explain that the English one was filled out "on accident" and that was why they went through it in detail. R. 102:8. The trial court also appeared concerned about why Mr. Lopez would waive the minimum time for sentencing. R. 102:9. The court inquired from Mr. Lopez if he understood that if he was sentenced he would be giving up his right to withdraw his guilty plea. R. 102:11. Mr. Lopez responded "yes." R. 102:11. The court then asked Mr. Lopez whether he understood that if he was released to INS, then he would be "prohibited from coming back to this country if they deport you without their permission." R. 102:11. Mr. Lopez responded, "yes." R. 102:11.

After the completion of the hearing, the trial court never entered a signed final judgment but instead entered upon the change of plea notice an Order setting aside Mr. Lopez's guilty plea. R. 51. The primary reason cited by the trial court for not entering the guilty plea was the court's concerns "about whether or not Mr. Lopez fully understood what was going on" during the plea hearing because an English, rather than a Spanish, plea form was used. R. 103:5.

The trial court was concerned about whether Mr. Lopez's, a native Spanish speaker, really understood what he was doing and the consequences of the guilty plea he

was entering. See Corwell, 2003 UT App 261 at 13 (rule 11 "requires that the trial court ensure that defendants know their rights and the consequences for waiving them by pleading guilty"). At the rehearing on the matter, the trial court explained:

It 's been brought to the Court's attention - - in fact, we discussed this at the time that the plea form itself was in English and not in Spanish. Mr. de la Cruz is not fluent in English. This form was translated for him, but based upon information the Court received, I have serious concerns that Mr. Lopez understands the ramifications of what he is doing and what a plea to these charges means to him.

Based upon that understanding I've asked you to appear back here today because it might be appropriate for the Court to set aside his plea in this case and allow this matter to proceed. Mr. Lopez receiving, I believe, information clearly in Spanish that he can understand the ramifications, the plea here will eliminate the fact that he will be able to spend any time with his family for the rest of his life.

....

I think it's important for [the parties] to understand, this matter is here on the Court's own motion. It is the Court who is bringing him back and not Mr. de la Cruz Lopez. I have concerns about whether or not Mr. Lopez fully understood what was going on.

One of the concerns I have is is that it's always easy to say, "I translate things for people and I tell them," but some people do not understand as well when it's translated and it's said to them orally things that they could have read that were printed in their own language. I think that's a critical thing here to think about whether or not he would be able to read this and we'd have a different effect here. We may not have, but I'm concerned about the long-term consequences here to Mr. Lopez, and I want him to be clear as to what they are.

R. 103:2-3, 5-6.

The trial court was primarily concerned with Mr. Lopez's ability to fully comprehend what was contained in the English plea form. And although the court also

expressed concern about whether Mr. Lopez understood that the plea would "eliminate the fact that he [would] be able to spend any time with his family for the rest of his life," case law does not prohibit a trial court from discussing collateral consequences with a defendant. See State v. Worthen, 2005 UT App 135 (unpublished memorandum decision) ("If a trial court chooses to inform a defendant about a collateral consequence, it must do so correctly." (citing State v. Rojas-Martinez, 2003 UT App 203, ¶¶7-8, 73 P.3d 967)). In fact, where deportation consequences have been misrepresented to a defendant, this Court has held a trial court errs if it denies a defendant's withdrawal of a guilty plea due to ineffective assistance of counsel. See Rojas-Martinez, 2003 UT App 203 at ¶11. In this case, in addition to the trial court's concerns that Mr. Lopez did not fully understanding the guilty plea he entered, the trial court may have believed that the consequences of Mr. Lopez's guilty plea had been misrepresented to him. The prosecutor's statement's to the trial court illustrate that there appeared to be misinformation being given about what deportation would mean to Mr. Lopez. The prosecutor stated:

At this point in time it's the State's position that defendant did know what he was doing based on Mr. Donaldson's representation and the Court's colloquy with the defendant. Everybody knew, including the defendant, that the plea meant he would be deported. Indeed Mr. Donaldson had had that conversation with me earlier on some earlier settings that that was going to be the remedy. Indeed I believe the defendant well knew that he was going to be deported.

I don't think it means that he can't see his family for the rest of his life. Clearly he can travel to and from once he follows the correct legal procedure, as well as his family can travel to and from as they follow the correct legal procedures.

R. 103:3.

The record demonstrates that the prosecutor's had incorrect information regarding deportation consequences and reentry into the country during these "earlier settings" when discussions with defense counsel took place about deportation. R. 103:3. This confusing and incorrect information regarding Mr. Lopez's ability to reenter after being deported may have concerned the trial court which required the trial court to set aside the guilty plea. See Rojas-Martinez, 2003 UT App 203 at ¶8. However, regardless of the trial court's concerns about the collateral consequences of the guilty plea, the trial court's primary concern was that Mr. Lopez did not have a full understanding when he entered his guilty plea because an English plea form was used instead of a Spanish one.

Given the trial court's inherent power to amend orders to conform with justice and its heavy burden of ensuring Mr. Lopez's guilty plea strictly complied with Rule 11 requirements, it was within the trial court's discretion to immediately set the plea aside because it believed, upon further reflection, that the plea was not made knowingly. See State v. Lara, 2003 UT App 318, ¶17 n.2, 79 P.3d 951 (noting that "unequivocal statements of knowing and voluntary waiver" by a defendant "have nevertheless been set aside" (citing State v. Norris, 2002 UT App 305, ¶13, 57 P.3d 238; State v. Thurman, 911 P.2d 371, 375 (Utah 1996))). "After all, the trial court - having the benefit of questioning the defendant and observing his demeanor - is in the best position to determine whether the defendant knowingly, voluntarily, and intelligently" enter his guilty plea. State v.

Heaton, 958 P.2d at 918; State v. Pena, 869 P.2d 932, 936 (Utah 1994) (trial courts are "considered to be in the best position to assess the credibility of [the parties] and to derive a sense of the proceeding as a whole").

In this case, the trial court was able to observe Mr. Lopez as he answered the questions put forth to him by the court, it was able to watch his body language and facial expressions and was in the best position to determine whether Mr. Lopez fully understood. The trial court was not obligated to take defense counsel's statement that Mr. Lopez understood the plea form that they had gone over. See Thurman, 911 P.2d at 372 (A trial court does not fulfill its duty of ensuring a defendant's constitutional rights by "assum[ing] that defense attorneys make sure that their clients fully understand the contents of the affidavit.")

Based on the trial court's impressions and observations of Mr. Lopez, it was within its discretion to set the plea aside because it believed that Mr. Lopez did not really understand the plea he was entering. If the trial court believed that a violation of Mr. Lopez's constitutional rights had occurred, it did not only have the discretion to remedy the error but it had a duty to do so. See Thurman, 911 P.2d at 372 (trial court does not sustain its burden of ensuring a defendant's constitutional rights have been observed by "assum[ing] that defense attorneys make sure that their clients fully understand the contents of the affidavit").

In fact, the trial court also had the procedural remedy available to set aside Mr. Lopez's plea by declaring a misplea. When a trial court believes that an error or an injustice has occurred in accepting a defendant's guilty plea it has the ability to declare a misplea and set aside a plea. A trial court can "rescind its acceptance of [a] guilty plea . . . based on a showing of 'manifest necessity' and 'no undue prejudice to the defendant.'" State v. Horrocks, 2001 UT App 4, ¶27, 17 P.3d 1145 (citations omitted). Manifest necessity exists when a "trial court has committed obvious reversible error." State v. Moss, 921 P.2d 1021, 1026 (Utah Ct. App. 1996). Manifest necessity has been equated to Utah's standard of "legal necessity" which has been defined as "the only reasonable alternative to insure justice under the circumstances." West Valley City v. Patten, 1999 UT App. 149, ¶10, 981 P.2d 420. Appellate courts have found that "[t]here 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." Id. The supreme court also noted that "there may be other circumstances . . . [that] will also warrant a misplea." State v. Kay, 717 P.2d 1294, 1305 (Utah 1986) (court finding that violation of Utah Rule of Criminal Procedure 11 in accepting guilty plea justified declaration of misplea).

In this case, the trial court believed that Mr. Lopez did not knowingly enter his guilty plea because the plea form was not in Spanish and "some people do not understand as well when it's translated and its said to them orally [than] they could have read that were printed in their own language." R. 103:6-7. The trial court thought that in this case

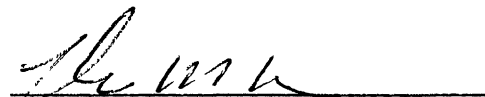
the plea form being in English was "a critical thing" and whether or not he had the opportunity to read the form for himself. R. 103:6. The trial court was in the best position to determine whether defendant understood the proceedings, it was in the best position to view the defendant's demeanor and look at the defendant's understanding of the proceedings as a whole. The trial court was in the best position to determine whether or not rule 11 was strictly complied with and once it made its determination that it was not, the court had the power to declare a misplea.

In sum, the trial court did not lose jurisdiction to withdraw Mr. Lopez's guilty plea upon sentencing because it did not enter a final signed order of judgment and is not constrained by the limitations of Utah Code Ann. § 77-13-6. Instead, both the plain language and legislative history of section 77-13-6 is clear that the process set out in the plea statute for withdrawing a guilty plea only applies to motions made by defendants. A trial court has inherent power and authority to amend and control its orders to conform with the law and justice. Inherent of the trial court's power is its duty to ensure that a criminal defendant's constitutional rights are observed and protected. This heavy burden placed solely on the trial court to ensure that a defendant knows and understands the rights they are giving up cannot be sustained ' assuming that defense counsel or other parties have made a defendant aware of his rights. Therefore, given the trial court's heavy burden and its inherent power and duty to protect a criminal defendant's constitutional rights, it was within its discretion to set aside Mr. Lopez's guilty plea.

CONCLUSION

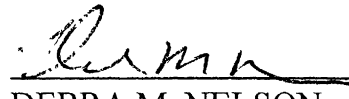
For the reasons set forth herein, Mr. Lopez respectfully requests that this Court affirm the trial court's order setting his guilty plea aside.

SUBMITTED this 14th day of April, 2005.


DEBRA M. NELSON
Attorney for Defendant/Appellee

CERTIFICATE OF DELIVERY

I, DEBRA M. NELSON, hereby certify that I have caused to be hand-delivered eight copies of the foregoing to the Court of Appeals, 450 South State Street, Salt Lake City, Utah 84114-0230, and four copies to the Attorney General's Office, 160 East 300 South, 6th Floor, P. O. Box 140854, Salt Lake City, Utah 84114-0854, this 14th day of April, 2005.


DEBRA M. NELSON

DELIVERED to the Utah Court of Appeals and the Attorney General's Office as indicated above this 14th day of April, 2005.



ADDENDUM A

77-18a-1. Appeals — When proper.

- (1) An appeal may be taken by the defendant from:
 - (a) the final judgment of conviction, whether by verdict or plea;
 - (b) an order made after judgment that affects the substantial rights of the defendant;
 - (c) an interlocutory order when upon petition for review the appellate court decides the appeal would be in the interest of justice; or
 - (d) any order of the court judging the defendant by reason of a mental disease or defect incompetent to proceed further in a pending prosecution.
- (2) An appeal may be taken by the prosecution from:
 - (a) a final judgment of dismissal, including a dismissal of a felony information following a refusal to bind the defendant over for trial;
 - (b) an order arresting judgment;
 - (c) an order terminating the prosecution because of a finding of double jeopardy or denial of a speedy trial;
 - (d) a judgment of the court holding a statute or any part of it invalid;
 - (e) an order of the court granting a pretrial motion to suppress evidence when upon a petition for review the appellate court decides that the appeal would be in the interest of justice;
 - (f) under circumstances not amounting to a final order under Subsection (2)(a), a refusal to bind the defendant over for trial on a felony as charged or a pretrial order dismissing or quashing in part a felony information, when upon a petition for review the appellate court decides that the appeal would be in the interest of justice;
 - (g) an order of the court granting a motion to withdraw a plea of guilty or no contest; or
 - (h) a finding pursuant to Title 77, Chapter 15a, Exemptions from Death Penalty in Capital Cases, that a capital defendant is exempt from a sentence of death, when upon a petition for review the appellate court decides that the appeal would be in the interest of justice.

77-13-6. Withdrawal of plea.

- (1) A plea of not guilty may be withdrawn at any time prior to conviction.
- (2) (a) A plea of guilty or no contest may be withdrawn only upon leave of the court and a showing that it was not knowingly and voluntarily made.
(b) A request to withdraw a plea of guilty or no contest, except for a plea held in abeyance, shall be made by motion before sentence is announced. Sentence may not be announced unless the motion is denied. For a plea held in abeyance, a motion to withdraw the plea shall be made within 30 days of pleading guilty or no contest.
(c) Any challenge to a guilty plea not made within the time period specified in Subsection (2)(c) shall be pursued under Title 78, Chapter 35a, Post-Conviction Remedies Act, and Rule 65C, Utah Rules of Civil Procedure.

78-7-5. Powers of every court.

Every court has authority to:

- (1) preserve and enforce order in its immediate presence;
- (2) enforce order in the proceedings before it, or before a person authorized to conduct a judicial investigation under its authority;
- (3) provide for the orderly conduct of proceedings before it or its officers;
- (4) compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in a pending action or proceeding;
- (5) control in furtherance of justice the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it in every matter;
- (6) compel the attendance of persons to testify in a pending action or proceeding, as provided by law;
- (7) administer oaths in a pending action or proceeding, and in all other cases where necessary in the exercise of its authority and duties;
- (8) amend and control its process and orders to conform to law and justice;
- (9) devise and make new process and forms of proceedings, consistent with law, necessary to carry into effect its authority and jurisdiction; and
- (10) enforce rules of the Supreme Court and Judicial Council.

UTAH RULES OF CRIMINAL PROCEDURE

Rule 11. Pleas.

(a) Upon arraignment, except for an infraction, a defendant shall be represented by counsel, unless the defendant waives counsel in open court. The defendant shall not be required to plead until the defendant has had a reasonable time to confer with counsel.

(b) A defendant may plead not guilty, guilty, no contest, not guilty by reason of insanity, or guilty and mentally ill. A defendant may plead in the alternative not guilty or not guilty by reason of insanity. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(c) A defendant may plead no contest only with the consent of the court.

(d) When a defendant enters a plea of not guilty, the case shall forthwith be set for trial. A defendant unable to make bail shall be given a preference for an early trial. In cases other than felonies the court shall advise the defendant, or counsel, of the requirements for making a written demand for a jury trial.

(e) The court may refuse to accept a plea of guilty, no contest or guilty and mentally ill, and may not accept the plea until the court has found:

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

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

(e)(3) the defendant knows of the right to the presumption of innocence, the right against compulsory self-incrimination, the right to a speedy public trial before an impartial jury, the right to confront and cross-examine in open court the prosecution witnesses, the right to compel the attendance of defense witnesses, and that by entering the plea, these rights are waived;

(e)(4)(A) the defendant understands the nature and elements of the offense to which the plea is entered, that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt, and that the plea is an admission of all those elements;

(e)(4)(B) there is a factual basis for the plea. A factual basis is sufficient if it establishes that the charged crime was actually committed by the defendant or, if the defendant refuses or is otherwise unable to admit culpability, that the prosecution has sufficient evidence to establish a substantial risk of conviction;

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

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

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

(e)(8) the defendant has been advised that the right of appeal is limited.

These findings may be based on questioning of the defendant on the record or, if used, a written statement reciting these factors after the court has established that the defendant has read, understood, and acknowledged the contents of the statement. If the defendant cannot understand the English language, it will be sufficient that the statement has been read or translated to the defendant.

Unless specifically required by statute or rule, a court is not required to inquire into or advise concerning any collateral consequences of a plea.

(f) Failure to advise the defendant of the time limits for filing any motion to withdraw a plea of guilty, no contest or guilty and mentally ill is not a ground for setting the plea aside, but may be the ground for extending the time to make a motion under Section 77-13-6.

(g)(1) If it appears that the prosecuting attorney or any other party has agreed to request or recommend the acceptance of a plea to a lesser included offense, or the dismissal of other charges, the agreement shall be approved by the court.

(g)(2) If sentencing recommendations are allowed by the court, the court shall advise the defendant personally that any recommendation as to sentence is not binding on the court.

(h)(1) The judge shall not participate in plea discussions prior to any plea agreement being made by the prosecuting attorney.

(h)(2) When a tentative plea agreement has been reached, the judge, upon request of the parties, may permit the disclosure of the tentative agreement and the reasons for it, in advance of the time for tender of the plea. The judge may then indicate to the prosecuting attorney and defense counsel whether the proposed disposition will be approved.

(h)(3) If the judge then decides that final disposition should not be in conformity with the plea agreement, the judge shall advise the defendant and then call upon the defendant to either affirm or withdraw the plea.

(i) With approval of the court and the consent of the prosecution, a defendant may enter a conditional plea of guilty, guilty and mentally ill, or no contest, reserving in the record the right, on appeal from the judgment, to a review of the adverse determination of any specified pre-trial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

(j) When a defendant tenders a plea of guilty and mentally ill, in addition to the other requirements of this rule, the court shall hold a hearing within a reasonable time to determine if the defendant is mentally ill in accordance with Utah Code Ann. § 77-16a-103.

(Amended effective May 1, 1993; January 1, 1996; November 1, 1997; November 1, 2001; November 1, 2002.)