2005

Gary Lee Oliver v. State of Utah : Brief of Respondent

Utah Court of Appeals

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IN THE SUPREME COURT OF THE STATE OF UTAH

GARY LEE OLIVER, Petitioner/Petitioner, v. STATE OF UTAH, Respondent/Respondent.	Case No. 20050090-SC

BRIEF OF RESPONDENT

On Writ of Certiorari to the Utah Court of Appeals

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BRIEF OF RESPONDENT

JURISDICTION AND NATURE OF THE PROCEEDINGS

This case is before this Court on a writ of certiorari to the Utah Court of Appeals. This Court has jurisdiction pursuant to UTAH CODE ANN. § 78-2-2(3)(a) (West 2004).

ISSUES PRESENTED ON APPEAL AND STANDARD OF REVIEW

1. Was certiorari improvidently granted to review the merits of petitioner's guilty plea challenge when the post-conviction court dismissed the petition as untimely, the court of appeals affirmed that decision, and this court did not issue a writ of certiorari to review that issue?

No standard of review applies to this issue.

2. Alternatively, did petitioner's taking of prescription medication prior to pleading guilty render his plea unknowing or involuntary when the record of the plea colloquy demonstrated that (1) both the trial court and defense counsel asked about the medication's purpose; (2) petitioner was asked five times whether the medication affected his ability to think or understand the proceedings; (3) each time, petitioner affirmed that the medication did not affect his thinking or understanding; and (4) petitioner's demeanor and responses during the plea colloquy were consistent with his assertion that he could think clearly and that he understood the proceedings.

Standard of Review. "'On certiorari, [this Court will] review the court of appeals'[s] decision for correctness, giving its conclusions of law no deference.'" *State v. Reyes*, 2005 UT 33, ¶ 10, 116 P.3d 305 (quoting *State v. Geukgeuzian*, 2004 UT 16, ¶ 7, 86 P.3d 742).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

This case does not require interpretation of any constitutional provision, statute, or rule.

STATEMENT OF THE CASE

On 10 November 1994 petitioner pled guilty to one count of murder, a first degree felony. R. 156. On 20 January 1995 the trial court sentenced petitioner to serve five years to life in the Utah State Prison. R. 163.

On 2 September 2002 petitioner filed a petition for post-conviction relief. R. 163. He alleged several grounds for relief, including that "his plea was invalidly entered because he was under the effects of Nortriptaline, a psychotropic drug, which left him 'in a stupor' and he 'did not comprehend the nature of the proceedings." R. 163.

The post-conviction court dismissed the petition as untimely. R. 165, 167 (a complete copy of the post-conviction court's findings, conclusions, and order is attached as Addendum B). It concluded that its ruling on the timeliness issue was an "adequate and independent ground" for dismissing the petition. R. 165. Alternatively, the post-conviction court found that each of petitioner's claims failed as a matter of law. R. 165-67.

The court of appeals summarily affirmed the post-conviction court's ruling in an unpublished, memorandum decision. *See Oliver v. State*, 2004 UT App 360 (unpublished, memorandum decision) (a copy of this decision is attached as Addendum A). The opinion affirmed both the dismissal of the petition as untimely, and the alternative ruling denying petitioner's claims on their merits. *See id.*

Although petitioner sought review of the entire court of appeals' opinion, this Court granted a writ of certiorari "only as to the following issue: Whether disclosure of a defendant's taking of medication during a plea colloquy requires

further investigation by the sentencing court." R. 197. This Court set this matter to be heard with *State v. Beckstead*, which raises a similar issue. R. 197.

STATEMENT OF THE FACTS

On 23 June 1994 petitioner shot and killed his wife. R. 156. He pled guilty to one count of murder, a first degree felony. R. 156.

Petitioner executed an affidavit during the plea hearing. R. 59-65, 156. The affidavit stated, " I am not presently under the influence of any drug, medication or intoxicants which impair my judgment." R. 63. It also stated, "I believe myself to be of sound and discerning mind, mentally capable of understanding the proceedings and the consequences of my plea and free of any mental disease, defect or impairment that would prevent me from knowingly, intelligently and voluntarily entering my plea." R. 63, 157. Petitioner's defense counsel, Mr. Gilbert Athay, also certified that he believed that petitioner was "mentally and physically competent." R. 64, 157. Petitioner assured the trial court that he had read the plea affidavit and reviewed it with Mr. Athay. R. 68, 157.

During the plea colloquy, the following exchange took place:

> [THE COURT]: Are you presently under the influence of any alcohol or drugs of any kind?
>
> [PETITIONER]: No, sir.
>
> [THE COURT]: Have you taken anything in the last twenty-four hours?

[PETITIONER]: Only some pills over in the jail—telpolin—

[THE COURT]: What is the—

[PETITIONER]: To help me sleep.

MR. ATHAY: They affect your ability to think?

[PETITIONER]: I don't think so.

[MR. ATHAY]: They affect you ability to make decisions?

[PETITIONER]: No.

[MR. ATHAY]: Do you understand what we're doing here today?

[PETITIONER]: Yeah. Yeah.

[MR. ATHAY]: You and I have spoken about this plea on numerous occasions, have we not?

[PETITIONER]: Uh-huh.

[MR. ATHAY]: And at any time have the pills affected your judgment in deciding whether to enter this plea?

[PETITIONER]: No.

THE COURT: Do you feel like you were under the influence of these pills right now? You can understand what it is that I have told you?

[PETITIONER]: No, I understand. I understand.

[THE COURT]: Do you have any questions about theses proceedings so far, Mr. Oliver?

[PETITIONER]: No.

MR. ATHAY: May I ask a couple of other questions?

THE COURT: Yes, uh-huh—

MR. ATHAY: They give you these to control mood swings that you have?

MR. OLIVER: I guess that's—I told them I couldn't sleep so they gave me that stuff. I was depressed.

[MR. ATHAY]: That been as a rule what occurred in this case?

[PETITIONER]: Yeah.

[MR. ATHAY]: And the depression and lack of sleep not something you were concerned about prior to this event occur[r]ing?

[PETITIONER]: No.

[MR. ATHAY]: And those pills were given to alter the moods that you had found yourself in; is that correct?

[PETITIONER]: Yes.

R. 75-76 (a complete copy of the plea hearing transcript is attached as Addendum C).

Following the plea colloquy, the trial court found "that the plea has been freely, voluntarily and knowingly entered." R. 76. The trial court based its finding "on the [petitioner's] responses to the court's questions and observations of the [petitioner]." R. 76.

The post-conviction court (the same court that conducted the plea colloquy) reviewed the record of the colloquy and found that petitioner

"responded directly, coherently, and cogently to each of the Court's questions." R. 157 (Add. B).

SUMMARY OF ARGUMENT

I. This Court should dismiss the writ of certiorari as improvidently granted because the judgment below rests on an independent ground that is not at issue. The post-conviction court denied petitioner relief on two independent grounds: (1) the petition was untimely, and (2) petitioner's claims failed on their merits. The Court of appeals affirmed both rulings. This Court declined to review the timeliness issue. That decision was correct because petitioner sought certiorari review of that issue on an improper ground. This Court did grant certiorari to review the merits of petitioner's guilty plea challenge. However, any further review of that claim is unnecessary because the claim was brought in an untimely petition.

II. Alternatively, the court of appeals correctly affirmed the post-conviction court's ruling that petitioner had failed to demonstrate that his medication rendered his plea unknowing or involuntary. Other courts to address this issue recognize that while information about the type, amount, and timing of previously ingested medication may be helpful, that information is no substitute for a trial court's direct inquiry about how the medication is affecting the defendant's state of mind at the time of the plea, and the court's objective

assessment of demeanor and responsiveness during a thorough plea colloquy. This approach is consistent with this Court's direction that an adequate guilty plea colloquy does not require a formalistic ritual or recitation of scripted questions.

Petitioner's repeated assurances that the medication did not affect his ability to enter a guilty plea, coupled with his lucid performance during the plea colloquy, established that his plea was knowingly and voluntarily entered.

ARGUMENT

I. CERTIORARI WAS IMPROVIDENTLY GRANTED TO REVIEW PETITIONER'S GUILTY PLEA CHALLENGE BECAUSE THE CLAIM WAS BROUGHT IN AN UNTIMELY POST-CONVICTION PETITION

This Court may dismiss a writ of certiorari on the ground that it was improvidently granted. *See State v. Sims*, 881 P.2d 840, 841 (Utah 1994) (dismissing a writ of certiorari as improvident when the issue was moot). Certiorari is improvidently granted when, among other things, the "decision of the question upon which certiorari was granted . . . prove[s] unnecessary since the judgment below was clearly correct on another ground." *Israel Pagan Estate v. Capitol Thrift & Loan*, 771 P.2d 1032, 1032 (Utah 1989) (Howe, J., dissenting) (citing *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180 (1959). That is the case here.

The post-conviction court denied relief on two independent grounds: (1) the petition was untimely, and (2) petitioner's claims, including his guilty plea challenge, failed on their merits. R. 167 (Add. B). The post-conviction court specifically found that its ruling that the petition was untimely was an adequate and independent ground for dismissing the petition. R. 165, 167. The court of appeals affirmed both of the post-conviction court's rulings. *Oliver v. State*, 2004 UT App 360 (unpublished memorandum decision) (Add. A). Petitioner sought certiorari review of both issues. However, this Court granted the petition for writ of certiorari, "only as to the following issue: Whether disclosure of a defendant's taking of medication during a plea colloquy requires further investigation by the sentencing court." R. 197.

This Court correctly declined to review the statute of limitations issue because petitioner did not properly seek certiorari review of that issue. In his petition for writ of certiorari, petitioner argued that the Post-Conviction Remedies Act's statute of limitations was an unconstitutional suspension of the writ of habeas corpus. However, petitioner did not raise a suspension clause claim below. Rather, he argued that the statute of limitations could not apply based on prior precedent, and also because he was sentenced before the statute was enacted. R. 107-08. Therefore, petitioner sought certiorari review of his statute of limitations claim on an improper basis. *See Debry v. Noble*, 889 P.2d

428, 444 (Utah 1995) ("issues not raised in the court of appeals may be raised on certiorari unless the issue arose for the first time out of the court of appeals' decision").

This Court's refusal to review the statute of limitations issue renders unnecessary any further review of petitioner's case. The post-conviction court's ruling that the petition was untimely, and the court of appeals' affirmation of that ruling, is dispositive of petitioner's case. Because the judgment below is "correct on another ground," certiorari review of petitioner's guilty plea challenge is improvident. *See Israel Pagan Estate*, 771 P.2d at 1032 (Howe, J., dissenting).

II. ALTERNATIVELY, THE TRIAL COURT'S PLEA COLLOQUY ADEQUATELY INQUIRED INTO PETITIONER'S ABILITY TO ENTER A KNOWING AND VOLUNTARY GUILTY PLEA

When a criminal defendant enters a guilty plea, the trial court bears the burden "to 'personally establish that the defendant's guilty plea is truly knowing and voluntary and establish on the record that the defendant knowingly waived his or her constitutional rights.'" *State v. Corwell*, 2005 UT 28, ¶ 11, 114 P.3d 569 (quoting *State v. Visser*, 2000 UT 88, ¶ 11, 22 P.3d 1242). The ultimate objective "is to ensure that defendants know of their rights and thereby understand the basic consequences of their decision to plead guilty." *Visser*, 2000 UT 88 at ¶ 11.

This Court has counseled that this "goal should not be overshadowed or undermined by formalistic ritual." *Id.* Therefore, a trial court is not required to "follow a 'particular script'" when conducting a guilty plea colloquy. *Corwell*, 2005 UT 28 at ¶ 12 (citing *Visser*, 2000 UT 88 at ¶ 13).

When a trial court learns during a plea colloquy that a defendant is taking medication, the court "has a duty to inquire into the defendant's capacity to enter a guilty plea." *United States v. Savinon-Acosta*, 232 F.3d 265, 268 (1st Cir. 2000) (citing *Miranda-Gonzalez v. United States*, 181 F.3d 164, 166 (1st Cir. 1999)). "The critical question is whether the drugs—if they have a capacity to impair the defendant's ability to plead—have in fact done so on this occasion." *Id.*

The First Circuit has suggested that when courts undertake this inquiry "[t]he better practice would be to identify which drugs a defendant is taking, how recently they have been taken and in what quantity, and (so far as possible) the purpose and consequences of the drugs in question." *Savinon-Acosta*, 232 F.3d at 268. Nevertheless, "there is certainly no settled rule that a hearing cannot proceed unless precise names and quantities of drugs have been identified." *Id.* at 269.

The sufficiency of a trial court's inquiry ultimately turns on whether the court adequately inquired about the medication's effects on the defendant's mental state at the time of the plea. *See Cody v. United States*, 249 F.3d 47, 53 (1st

Cir. 2001); *Savinon-Acosta*, 232 F.3d at 268; *Miranda-Gonzalez*, 181 F.3d at 165. The First Circuit has recognized that "[c]ourts have commonly relied on the defendant's own assurance (and assurances from counsel) that the defendant's mind is clear" especially when "the defendant's own performance in the course of a colloquy . . . confirm[s] . . . his assurances." *Savinon-Acosta*, 232 F.3d at 269. Hence, although the First Circuit "would have been more comfortable if the district court had been able to ascertain the name of the tranquilizer and the quantity" that Savinon-Acosta had taken on the morning of his change of plea hearing, the trial court "did determine the purpose of the medicine and then asked specifically, 'Does that medicine in any way affect your ability to understand the conversation we're having this morning?'" *Id.* Savinon-Acosta's own assurance that it did not—"No. No. I understand perfectly"—together with his lucid performance during the plea colloquy, was sufficient to establish the validity of his guilty plea. *Id.*

Similarly, in *Cody*, the First Circuit suggested that "the [district] court might have probed further into the purpose and effects of lithium" which the defendant was taking, presumably because he suffered from post-traumatic stress syndrome. 249 F.3d at 53. Nevertheless, the district court "at least conducted the minimum inquiry required" because it twice asked Cody whether the medication "affected his ability to make reasoned decisions." *Id.* Moreover,

Cody's appearance and demeanor supported his assurances that the medication did not impair his understanding of the proceedings. *Id.* at 53 n.5.

Other courts have reached similar results. *See United States v. Browning*, 61 F.3d 752, 754 (10th Cir. 1995) (upholding Browning's guilty plea where he assured court that his medication "had not" "affected [his] ability to think or comprehend" and record was devoid of evidence "that his ability to enter a knowing and voluntary plea was affected by the medications"); *United States v. Vaughan*, 13 F.3d 1186, 1187 (8th Cir.) (rejecting Vaughan's claim that his mental condition prevented him from entering a knowing guilty plea where Vaughan had "denied that he was under the influence of 'anything, medication or otherwise' that would make it difficult for him to understand why he was pleading guilty," and where Vaughan's "sworn statements were lucid, articulate, and inconsistent with his claim that he did not enter a knowing and intelligent plea"), *cert. denied*, 511 U.S. 1094 (1994); *United States v. Dalman*, 994 F.2d 537, 538-539 (8th Cir. 1993) (upholding Dalman's guilty plea where, even though he was "taking four different types of pills," Dalman assured court that he understood what was happening "'right now'"); *Froistad v. State*, 641 N.W.2d 86, 95-96 (N.D. 2002) (upholding guilty plea where Froistad assured trial court that prescribed medication he was taking did not affect his "thinking faculties" and "nothing in the record [] indicate[d] that Froistad was confused or unaware of what was

taking place during the proceeding"); *State v. Mink*, 805 N.E.2d 1064, 1076-1077 (Ohio 2004) (upholding guilty plea where Mink assured trial court "that [his] medication had no effect on his ability to understand the court's proceedings"); *State v. Ries*, 849 P.2d 184, 186 (Mont. 1993) (upholding guilty plea where Ries denied taking any medication "at the moment" and affirmed that his "mind" was "clear").

A trial court's inquiry is insufficient when it entirely fails to make any inquiry about a medication's effects on the defendant's ability to enter a plea. For example, in *United States v. Cole*, 813 F.2d 43, 47 (3rd Cir. 1987), the Third Circuit reversed when, after learning that the pleading defendant had recently taken drugs, "the [district] court failed to inquire further or even acknowledge that it was aware of this evidence." Similarly, in *United States v. Parra-Ibanez*, 936 F.2d 588, 591, 596 (1st Cir. 1991), the trial court learned the names of the medications and the reason defendant was taking them, but did not ask "what effects, if any such medications might be likely to have on [the defendant's] clear-headedness." Likewise, in *United States v. Damon*, 191 F.3d 561, 563 (4th Cir. 1999), Damon stated that he was taking an antidepressant because of a recent suicide attempt, but the district court "did not ask any follow-up questions about whether the medication had any actual effect on Damon's ability to enter a competent and voluntary plea."

The inquiries in *Cole*, *Parra-Ibanez*, and *Damon* were not insufficient because the trial courts failed to ascertain the precise name, dosage, or effects of the medications. Rather, they were insufficient because the trial courts failed to ask whether the medications affected the defendant's ability to think and comprehend during the plea colloquy. Thus, the primary concern reflected in all of the above cases is not so much with the "precise names and quantities of drugs" consumed, but rather with whether the record supports a finding that the defendant understood the proceedings. *Savinon-Acosta*, 232 F.3d at 269.

Courts generally recognize that while information about the type, amount, and timing of previously ingested medication may be enlightening in some circumstances, it is no substitute for a trial court's direct inquiry about how the medication affects the defendant's state of mind at the time of the plea, and the court's objective assessment of demeanor and responsiveness during a thorough plea colloquy. This approach is consistent with this Court's counsel that the purpose of a guilty plea colloquy "should not be overshadowed or undermined by formalistic ritual," or a "particular script" of questions. *See Visser*, 2000 UT 88 at ¶ 11.

In *State v. Beckstead*, 2004 UT App 338, ¶¶ 1-3, 100 P.3d 267 *cert. granted*, 109 P.3d 804 (Utah 2005), the court of appeals addressed the sufficiency of a trial court's colloquy with a defendant who had been drinking on the morning of his

plea hearing. Beckstead filed a motion to withdraw his plea, alleging in part that he was intoxicated when he pled guilty. *Id.* at ¶ 4. The trial court denied the motion but the court of appeals reversed, holding that the trial court's plea colloquy was inadequate. *Id.* at ¶ 11. The court of appeals reasoned that when the trial court learned that Beckstead had been drinking, its duty to strictly comply with Rule 11 of the Utah Rules of Criminal Procedure required it to specifically ask about "the amount of alcohol that Beckstead had consumed [and] the amount of time that had elapsed since his last drink." *Id.* at ¶¶ 10-11.

This Court has ordered that this case will be heard in conjunction with the petition in *Beckstead*.[1] R. 197. Although the issues in the two cases are similar, the cases' procedural postures are not. Beckstead directly challenged his guilty plea through a motion to withdraw. *Beckstead*, 2004 UT App 338 at ¶ 4. Therefore, to prevail, Beckstead had to demonstrate that the trial court failed to strictly comply with Rule 11 in accepting his guilty plea. *Id.* at ¶ 6. In contrast, petitioner collaterally challenged his guilty plea through a petition for post-conviction relief. R. 1, 7. For petitioner to prevail, he must demonstrate that his "conviction was obtained . . . in violation of the United States Constitution or

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[1] Although *Beckstead* was issued fifteen days before the opinion in petitioner's case, the court of appeals did not apply or reference *Beckstead*. *See Oliver*, 2004 UT App 360 (Add. A). For the reasons explained in this brief, and in the State's briefs in *Beckstead*, the court of appeals' opinion in *Beckstead* should be reversed, while the opinion in petitioner's case should be affirmed.

Utah Constitution." *See* UTAH CODE ANN. § 78-35a-104(1)(a) (West 2004). "[C]ompliance with rule 11 is not *constitutionally* required." *Salazar v. Warden*, 852 P.2d 988, 991 (Utah 1993) (emphasis in original). Therefore, unlike *Beckstead*, petitioner "must show more than a violation of the prophylactic provisions of rule 11; he . . . must show that the guilty plea was in fact not knowing and voluntary." *Id.* at 992. The court of appeals correctly held that he failed to do so.

The court of appeals correctly affirmed the post-conviction court's finding that petitioner had not demonstrated that his medication rendered him unable to enter a knowing a voluntary guilty plea. During the plea colloquy, the trial court asked petitioner whether he had "taken anything in the last twenty-four hours." R. 75 (Add. C). Petitioner replied: "Only some pills over in the jail—telpolin—." R. 75. Both the trial court and defense counsel then asked about the medication's purpose, which petitioner explained was to treat his depression and help him sleep. R. 75, 76. Both the trial court and defense counsel then asked, in five different ways, whether the medication affected petitioner's ability to think or understand the proceedings. R. 75-76. Each time, petitioner stated that the medication did not affect his ability to think and that he understood what was happening. R. 75-76. When asked whether he understood the purpose of the plea hearing, petitioner responded, "Yeah. Yeah." R. 75. When the trial court asked whether petitioner felt like he was "under the influence of these pills right

now" and whether he could understand what the trial court had told him, petitioner replied, "No, I understand. I understand." R. 75.

Although petitioner could not remember the exact name of the medication he had taken, the trial court did learn the purpose of the medication and that petitioner had taken it within twenty-four hours of the plea. R. 75-76. Most importantly, both the trial court and defense counsel repeatedly asked whether the medication affected petitioner's ability to think or to understand the proceedings and petitioner repeatedly stated that it did not. R. 75-76. Moreover, petitioner's lucid performance during the rest of the plea colloquy supported his assurances that he understood the proceedings. R. 68-77. In fact, the trial court found petitioner's plea to be "voluntarily and knowingly entered . . . based on [petitioner's] responses to the court's questions and observations of the [petitioner]." R. 76.

"'The mere fact that [petitioner] took potentially mood-altering medication is not sufficient to vitiate his plea.'" *Miranda-Gonzalez v. United States*, 181 F.3d 164, 165 (1st Cir. 1999) (quoting *United States v. Pellerito*, 878 F.2d 1535, 1537 (1st Cir. 1989)). "Rather, [petitioner] must show 'that the medication affected his rationality.'" *Id.*

Petitioner did not demonstrate that his medication affected his rationality. As in *Savinon-Acosta* and *Cody*, petitioner's assurances that the medication did

not affect his ability to enter a guilty plea, coupled with his lucid performance during the plea colloquy, sufficiently establish that his plea was knowingly and voluntarily entered. *Savinon-Acotsa*, 232 F.3d at 268-69; *Cody*, 249 F.3d at 52-53. Therefore, the court of appeals correctly affirmed the post-conviction court's alternative holding denying petitioner's guilty plea challenge on its merits.

Petitioner argues that the trial court should have held a separate hearing and received expert testimony regarding the medication he was taking. Pet'r Br. at 1. On the contrary, "practical judgments [about a medication's effect on a defendant] can usually be made[,]" and "[c]ourts have commonly relied on the defendant's own assurance (and assurances from counsel) that the defendant's mind is clear" together with "defendant's own performance in the course of a colloquy." *Savinon-Acosta*, 232 F.3d at 268-69.

Petitioner also argues that the trial court was required to conduct a competency examination. Pet'r Br. at 3. However, the issue of the need for a competency hearing was not raised below and was not included in this Court's order granting the writ of certiorari. R. 197. In any event, as explained above, the record of petitioner's plea colloquy demonstrates that petitioner was competent to enter his guilty plea.

Finally, petitioner relies on an internet printout allegedly describing Nortriptaline's affects, and also on his county jail medical records. Pet'r Br. at 7.

He attaches these documents to his brief as attachments four and five, respectively. The Court should strike these attachments because they were never presented to the post-conviction court and are therefore not part of the record. *See* Utah R. App. P. 24(a)(9) & (11) (requiring that citations in the argument portion of a brief, and the information included in the addendum, must be part of the record on appeal). An appellate court's "review is of course limited to the evidence contained in the record on appeal." *Wilderness Building Systems v. Chapman*, 699 P.2d 766, 767 (Utah 1985); *see also, Finlayson v. Finlayson*, 874 P.2d 843, 847 (Utah Ct. App. 1994) ("appellate courts of this state do not consider new evidence on appeal"). Because petitioner's attachments four and five are not part of the record, this Court should strike the documents, and all arguments based thereon, from petitioner's brief.

CONCLUSION

This Court should either dismiss the writ of certiorari as improvidently granted or affirm the court of appeals' decision.

Respectfully submitted 22 August 2005.

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Counsel for Respondent

MAILING CERTIFICATE

I hereby certify that on 22 August 2005, I mailed, postage prepaid, two accurate copies of the foregoing BRIEF OF APPELLEE to:

Gary Lee Oliver, #23553
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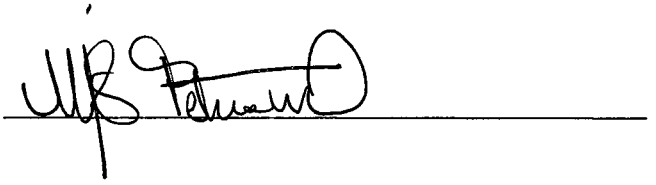
P.O. Box 250
Draper, UT 84020



Addenda

Addendum A

IN THE UTAH COURT OF APPEALS

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Gary Lee Oliver, Petitioner and Appellant, v. State of Utah, Respondent and Appellee.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20040320-CA F I L E D (October 15, 2004) 2004 UT App 360

Third District, Salt Lake Department
The Honorable Frank G. Noel

Attorneys: Gary Lee Oliver, Draper, Appellant Pro Se
Mark L. Shurtleff and Christopher D. Ballard, Salt Lake City, for Appellee

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Before Judges Davis, Jackson, and Orme.

PER CURIAM:

This case is before the court on its own motion for summary affirmance on the basis that the issues presented on appeal are so insubstantial as to not merit further consideration by the court. See Utah R. App. P. 10. The district court determined that the petition was untimely and that, even if it had been timely, the State was entitled to summary judgment.

The petition was determined to be untimely because the one-year statute of limitations on post-conviction remedies became effective on April 29, 1996. Oliver was sentenced on January 20, 1997, after the statute of limitations became effective. According to the district court, Oliver had until April 29, 1997 to file a post-conviction petition. He did not file until September 3, 2002. The court further found that Oliver did not meet the "interests of justice" exception to the statute of limitations.

Despite the finding that the petition was untimely, the district court went on to address whether, assuming the petition had been timely filed, the State would be entitled to summary judgment. Oliver's claims were that: he was under the influence of a psychotropic drug, given in the jail, that impaired his

ability to understand the change of plea; he was denied his right of appeal; the State failed to fulfill the terms of the plea agreement; and he received ineffective assistance of counsel in the plea and sentencing.

The district court, after reviewing the plea colloquy, determined that Oliver understood the proceedings. The court also determined that Oliver had not been deprived of his right to counsel because he had no right to appeal the sentence on the ground that his plea was invalid.

The district court determined that the State had fulfilled the terms of the plea agreement. The sentencing court declined to follow the recommendation of reducing the conviction, but did follow the recommendation not to impose a gun enhancement onto the five to life sentence. Further, Oliver was informed at the change of plea that the court is not bound to follow any recommendation.

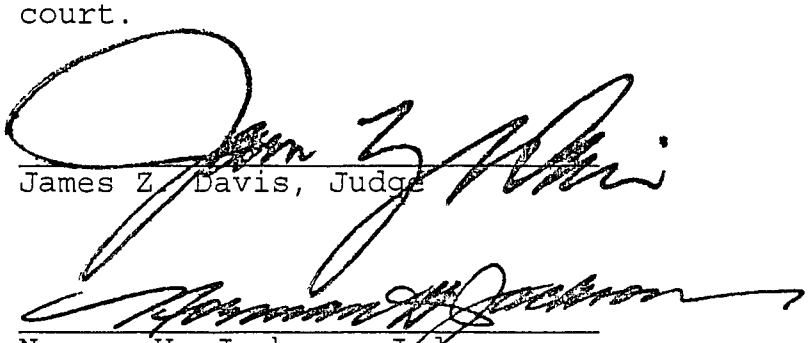
The court also determined that counsel was not ineffective. Counsel correctly informed Oliver that he could only move to withdraw his plea within thirty days of entry of the plea. This was the state of the law at the time Oliver was advised. The court also indicated that Oliver failed to demonstrate that he was prejudiced even if counsel had been ineffective.

Oliver has not demonstrated that these findings were erroneous. Oliver claims that to impose the statute of limitations on post-conviction petitions on him would be retroactive application of the statute. However, the statute went into effect before his sentencing and, therefore, is not retroactively imposed.

Oliver selects one phrase of the prosecutor's argument at the sentencing and change of plea hearing to support his argument that the prosecutor failed to fulfill the terms of the plea agreement. Review of the entire transcript shows that the prosecutor did fulfil the terms of the agreement, which was to recommend that Oliver be sentenced a degree lower with imposition of a gun enhancement, **or**, if Oliver was sentenced to five to life, to recommend life in prison with no gun enhancement.

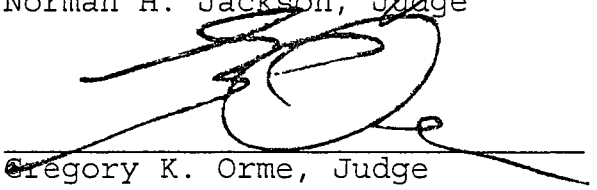
The district court was correct in determining that Oliver had not received ineffective assistance of counsel. Oliver was correctly advised of the state of the law regarding withdrawal of a plea as it existed at the time he was advised. Moreover, Oliver has not demonstrated, as he claims, that counsel was a "tool" of the State, nor has he shown that counsel's actions prejudiced him in any way.

We, therefore, summarily affirm the ruling of the district court.



James Z. Davis, Judge

Norman H. Jackson, Judge



Gregory K. Orme, Judge

Addendum B

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IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

GARY LEE OLIVER, Petitioner, v. STATE OF UTAH, Respondent.	FINDINGS OF UNDISPUTED FACT, CONCLUSIONS OF LAW, AND ORDER DISMISSING PETITION Case No. 020908646 Judge Frank G. Noel

This matter came before the Court on the State's motion to dismiss, or in the alternative for summary judgment. The Court has reviewed the petition and its attachments, the State's motion, and the memoranda filed in support of and in opposition to the motion. On 23 March 2004 the Court entered a minute entry ruling granting the State's motion and now enters the following findings of undisputed fact, conclusions of law, and order dismissing the petition.

FINDINGS OF UNDISPUTED FACT

The Crime

1. Defendant shot and killed his wife, Deolyn Oliver, with his "repeating-type rifle." Information at 2, attached as Exhibit A; Statement of Defendant, Certificate of Counsel & Order ("Plea Aff.") at 2, attached as Exhibit B; Tr. of 11/10/94 Plea Hearing ("Plea Hrng. Tr.") at 6-7, attached as Exhibit C.[1]

2. The State charged petitioner with one count of murder, a first degree felony. Information at 1.

The Plea Hearing

3. Petitioner pled guilty as charged. Plea Aff. at 1-7; Plea Hrng. Tr. at 1-11. He entered his plea on 10 November 1994. *Id.*

4. Petitioner executed a plea affidavit in which he acknowledged that he understood the rights he would waive by pleading guilty, the nature and elements of the offense, and the minimum and maximum sentence. Plea Aff. at 1-7.

5. The affidavit also explained the plea agreement, which required the State to "recommend as a maximum that [petitioner] serve no more than 1-15 y[ea]rs with a firearms enhancement or in the alternative will not pursue a firearms enhancement should the defendant be committed for 5-life." Plea Aff. at 4.

6. Regarding petitioner's right to appeal, the plea affidavit stated:

---

[1] The exhibits referred to are attached to the State's memorandum supporting its motion.

> I know that under the constitution of Utah that if I were tried and convicted by a jury or by the judge that I would have the right to appeal my conviction and sentence to the Utah Court of Appeals or, where allowed, the Utah Supreme Court and that if I could not afford to pay the cost for such appeal, those costs would be paid by the State.

Plea Aff. at 4.

7. Petitioner declared his understanding that "if I desire to withdraw my plea of guilty I must do so by filing a motion within thirty (30) days after entry of my plea." Plea Aff. at 5.

8. Petitioner also stated in his affidavit that he was "not presently under the influence of any drug, medication or intoxicants which impair [his] judgment" and he "believe[d] [him]self to be of sound and discerning mind, mentally capable of understanding the proceedings and the consequences of [his] plea and free of any mental disease, defect or impairment that would prevent [him] from knowingly, intelligently and voluntarily entering [his] plea." Plea Aff. at 5.

9. His trial counsel, Mr. Gilbert Athay, also certified that he believed petitioner was "mentally and physically competent." Plea Aff. at 6.

10. During the plea hearing petitioner assured the Court that he had read the plea affidavit and reviewed his constitutional rights with Mr. Athay. Plea Hrng. Tr. at 2-3. Petitioner signed the plea affidavit in open court. *Id.* at 4.

11. The Court also conducted a thorough colloquy with petitioner, reviewing petitioner's rights, the elements of the offense, and the minimum and maximum sentence. Plea Hrng. Tr. at 2-10.

12. Petitioner responded directly, coherently, and cogently to each of the Court's questions. *Id.*

13. None of petitioner's answers during the plea colloquy evidenced confusion or lack of comprehension. *Id.*

14. The Court informed petitioner that "if [he] were convicted at . . . trial [he] would have the right to appeal that conviction." Plea Hrng. Tr. at 3.

15. The Court also informed petitioner that any sentencing recommendations were not binding:

> [THE COURT]: Now, I understand that certain recommendations with regard to that sentence may be made to the court. You understand that the court is not bound by those recommendations?
>
> [PETITIONER]: Yes, sir.
>
> [THE COURT]: May be a recommendation that you serve a maximum of not more than one to fifteen years, with a firearm enhancement rather than a five to life. But you understand that the court is not bound by that recommendation?
>
> [PETITIONER]: Yes.
>
> [THE COURT]: That all options are open to the court in that the court impose by virtue of your plea here today, a penalty of five to life; do you understand that?
>
> [PETITIONER]: Yes.
>
> [THE COURT]: And no promises have been made to you as to what sentence this court is going to impose?
>
> [PETITIONER]: No.

Plea Hrng. Tr. at 4-5.

16. The Court also inquired about petitioner's mental and physical state:

> [THE COURT]: Are you presently under the influence of any alcohol or drugs of any kind?

[PETITIONER]: No, sir.

[THE COURT]: Have you taken anything in the last twenty-four hours?

[PETITIONER]: Only some pills over in the jail – telpolin —

[THE COURT]: What is the —

[PETITIONER]: To help me sleep.

MR. ATHAY: They affect your ability to think?

[PETITIONER]: I don't think so.

[MR. ATHAY]: They affect you ability to make decisions?

[PETITIONER]: No.

[MR. ATHAY]: Do you understand what we're doing here today?

[PETITIONER]: Yeah. Yeah.

MR. ATHAY: You and I have spoken about this plea on numerous occasions, have we not?

[PETITIONER]: Uh-huh.

[MR. ATHAY]: And at any time have the pills affected your judgment in deciding whether to enter this plea?

[PETITIONER]: No.

THE COURT: Do you feel like you were under the influence of these pills right now? You can understand what it is that I have told you?

[PETITIONER]: No, I understand. I understand.

[THE COURT]: Do you have any questions about theses proceedings so far, Mr. Oliver?

[PETITIONER]: No.

MR. ATHAY: May I ask a couple of other questions?

THE COURT: Yes, uh-huh-

MR. ATHAY: They give you these to control mood swings that you have?

MR. OLIVER: I guess that's – I told them I couldn't sleep so they gave me that stuff. I was depressed.

[MR. ATHAY]: That been as a rule what occurred in this case?

[PETITIONER]: Yeah.

[MR. ATHAY]: And the depression and lack of sleep not something you were concerned about prior to this event occur[r]ing?

[PETITIONER]: No.

[MR. ATHAY]: And those pills were given to alter the moods that you had found yourself in; is that correct?

[PETITIONER]: Yes.

Plea Hrng. Tr. at 9-10.

17. Following the above exchange the Court accepted petitioner's plea stating:

> Very well. Then the court finds that the plea has been freely, voluntarily and knowingly entered. The court makes that finding based on the defendants' responses to the court's questions and observations of the defendant. And I will sign this statement so indicating my finding.

Plea Hrng. Tr. at 10.

18. The Court also informed petitioner that if he desired to withdraw his guilty plea he "must make that request within thirty days." Plea Hrng. Tr. at 10.

Sentencing

19. Prior to sentencing, a presentence investigation report ("PSI") was prepared. Presentence Investigation Report, filed under seal in Case No. 941901063.

20. The PSI states that "there was no plea bargain in this case; the defendant pled guilty as charged to the offense of Murder, a First Degree Felony." PSI at 2.

21. The PSI also contains the following statement from the prosecutor, Kent Morgan:

> Mr. Kent Morgan, District Attorney's Office, recommends the defendant be incarcerated in the Utah State Prison. He stated, "The term should be no less than 1-15 years along with a consecutive firearms enhancement of five years, or a period of 5 years to life."

PSI at 7.

22. Mr. Athay wrote a letter to the Court prior to sentencing. Letter dated 1/18/95 to the Court from D. Gilbert Athay, attached as Exhibit D. In the letter Mr. Athay stated his belief that petitioner's crime fell under the definition of manslaughter. *Id.* at 3. He also stated:

> It is my considered judgment that Mr. Oliver should be sentenced as a second degree felony and I join with Mr. Kent Morgan of the District Attorney's office in recommending that the court, pursuant to Utah Code Ann. § 76-3-402(1) enter a judgment of conviction for the next lower degree of offense and impose a sentence of 1-15 years with a consecutive firearms enhancement of 5 years.

Id.

23. At sentencing the Court heard from the victim's sister and mother. Tr. of 1/20/95 Sentencing ("Sentencing Tr.") at 2-7, attached as Exhibit E.

24. Thereafter, the prosecutor, Mr. Morgan, made a brief statement to the Court:

> Your Honor, I don't think I can add anything to the feelings of loss or the manner in which the death was carried out in this case. I think the Courts' decision in this case is rather straight forward, is that Gary Oliver should be committed to the Utah State

> Prison forthwith. The question is, for how long? If the court is going to consider a 420, certainly recommend the Firearm Enhancement certainly be applied. Thank you, your Honor.

Sentencing Tr. at 7.

25. Mr. Athay argued that petitioner's crime "falls clearly within the one to fifteen year sentence as described by the statute; where the killing occurs as a result of a substantial emotional disturbance for which there is a reasonable explanation." Sentencing Tr. at 11.

26. Mr. Athay also stated:

> Mr. Morgan has indicated that on behalf of the State they certainly have no objection to that sentence being imposed with the gun enhancement and I think that is appropriate also. So at this time we would urge the court to impose a one to fifteen year sentence pursuant to the statute and impose the five year gun enhancement and we'll submit it.

Sentencing Tr. at 11.

27. Mr. Morgan responded:

> [W]hile we're not objecting or recommending we know that there are two alternatives the court can consider and it is a matter of practicality he be committed to the Utah State Prison and that he does one to fifteen with a gun enhancement [or] he get five to life. He'll get out at the same time; therefore that is our recommendation to the court.

Sentencing Tr. at 12.

28. After hearing from all concerned, the Court discussed the motion to reduce the level of the offense pursuant to section 76-3-402. It stated:

> Well, the court as you know is able to sentence in matter such as this to one degree lower. The statute allows the court to do that; again, the court has to look at the nature of the case, the circumstances of the offense and the history and character of the defendant. And if, after doing that, the court feels that it would be unduly harsh to impose the higher penalty, then the court may impose a sentence one degree lower.

> The court knew beforehand that this motion was going to be made to sentence one degree lower, so the court has very carefully gone through the record, at least that has been submitted to the court . . .

Sentencing Tr. at 12-13. The Court then listed the "numerous letters" it had received. *Id.* at 13. The Court also stated that neither petitioner's drinking, nor his anger at the time of the murder "justify sentencing one degree lower." *Id.* The Court continued:

> The court is of the opinion, that just simply cannot, going through this record carefully, determine based on all of these circumstances, including the history of the defendant who has served time a couple of times in prison, can the court find that it would be unduly harsh to sentence to the recommended five to life.

Id.

29. The Court sentenced petitioner to five years-to-life, and did not impose a firearms enhancement. Judgment, Sentence, Commitment at 1, attached as Exhibit F. The Court also granted petitioner credit for time served. *Id.*

30. Sentence was entered 20 January 1995. *Id.*

The Petition for Post-Conviction Relief

31. On 3 September 2002 petitioner filed a petition for relief under the Post-Conviction Remedies Act. Pet. at 1.

32. Petitioner alleged that:

> a) his plea was invalidly entered because he was under the effects of Nortriptaline, a psychotropic drug, which left him "in a stupor" and he "did not comprehend the nature of the proceedings, what [he] was doing or what was transpiring";
>
> b) he was denied his right to appeal because neither his attorney nor the Court informed him that he "could appeal the sentence if [his] plea was not, in fact, knowingly, intelligently and voluntarily made";

c) the State did not fulfil its part of the plea agreement because it failed to:

(i) make a motion pursuant to section 76-3-402; and

(ii) present evidence that would support imposition of a one-to-fifteen year sentence, rather than the five-to-life sentence;

d) Mr. Athay was ineffective because he:

(i) did not file a motion to withdraw petitioner's plea within thirty days of sentencing but instead "incorrectly" informed petitioner that his plea could only be withdrawn within thirty days of the date of the plea;

(ii) did not require the prosecutor to make a motion pursuant to section 76-3-402;

(iii) failed to alert the Court that the plea agreement required the State to make a motion pursuant to section 76-3-402; and

(iv) failed to correct the erroneous statement in the PSI stating that there was no plea agreement in this case, or to alert the Court that there was a plea bargain in this case.

Pet. at 7-9.

33. Petitioner states in his petition that "immediately after my sentencing I informed my attorney that I wanted to withdraw my plea and I was informed by my counsel that I could not withdraw my plea at that time, and could only have withdrawn my plea within 30 days of changing my plea. My attorney did not file a motion to withdraw my plea, even though it would have been well within 30 days of the date of sentencing." Pet. at 3.

34. Petitioner fails to allege any special or unusual circumstance that prevented him from timely filing his petition.

CONCLUSIONS OF LAW

1. The petition is untimely pursuant to UTAH CODE ANN. § 78-35a-107 (2002). Petitioner's conviction became final prior 29 April 1996, which is the effective date of the Post-Conviction Remedies Act. Therefore, petitioner had one year from the effective date of the Act, or until 29 April 1997, to file his petition. The petition was not filed until 3 September 2002.

a. The statute of limitations in section 78-35a-107 has not been declared unconstitutional. *See State v. Frausto*, 966 P.2d 849, 851 (Utah 1998) ("[W]e did not address the constitutionality of section 78-35a-107 in *Julian*"); *Swart v. State*, 1999 UT App 96, ¶ 4, 976 P.2d 100 ("no court has yet actually declared the statute of limitations set forth in section 78-35a-107 unconstitutional"). Therefore, this Court may properly apply section 78-35a-107 to this case.

b. Petitioner fails to allege, let alone demonstrate that any special or unusual circumstance prevented him from timely filing his petition. Petitioner's claim that he could not file his petition timely because he lacked the financial resources to retain post-conviction counsel is unavailing. Therefore, the "interests of justice" do not excuse his untimely filing. *See* UTAH CODE ANN. § 78-35a-107(3).

2. Although the untimeliness of the petition provides an adequate and independent ground upon which to dismiss the petition, the Court also makes the following alternative conclusions regarding the merits of each of petitioner's claims.

a. The record conclusively refutes petitioner's first claim that his plea was invalid because he was under the influence of Nortriptaline when he pled guilty. Petitioner was examined carefully by both the Court and his attorney with regard to the drug he had recently taken and denied

that it affected his ability to comprehend the proceedings. Moreover, the Court found petitioner's plea to be validly entered based upon its observations of petitioner at the time of the plea.

b. Petitioner's second claim, alleging that he was denied his right to appeal, also fails. Contrary to petitioner's allegation, he had no right to appeal his *sentence* on the ground that his plea was invalid. Petitioner could not attack the validity of his guilty plea by appealing the legality of his sentence. *See State v. Reyes*, 40 P.3d 630, 631 (Utah 2002).

c. Petitioner's third claim, alleging that the State did not fulfill its part of the plea agreement, also fails as a matter of law. The record conclusively establishes that the State was required to recommend at sentencing only that petitioner serve no more than 1-15 years with a firearms enhancement, or not pursue a firearms enhancement if petitioner was sentenced to 5-life. Plea Aff. at 4. The record confirms that the State made the recommendation and therefore, fulfilled its responsibilities under the plea agreement.

d. Petitioner's fourth claim, alleging ineffective assistance of counsel, also fails as a matter of law. Petitioner's counsel correctly informed petitioner regarding the deadlines for filing a motion to withdraw his plea based upon the law at the time the plea was entered. Under the law then in effect, petitioner's request that his counsel file a motion to withdraw his guilty plea was untimely because it was made more than thirty days after petitioner entered his plea. In any event, petitioner cannot demonstrate that he was prejudiced by any deficient performance in counsel's failure to file a motion to withdraw his guilty plea because, as discussed above, the record conclusively demonstrates that petitioner's plea was validly entered.

Because the State was not required to make a motion to reduce petitioner's sentence under section 76-3-402, petitioner's counsel was not ineffective for failing to require the State to do so, or for failing to alert the Court to the failure of the State to make such a motion. Finally, counsel was not ineffective for failing to correct the erroneous statement in the PSI that there was no plea agreement in this case. The record reflects that the Court was well aware of the plea agreement and even if it was not, petitioner received precisely what he bargained for—a sentence of 5-life without a firearms enhancement.

Based upon the foregoing conclusions of law the Court enters the following:

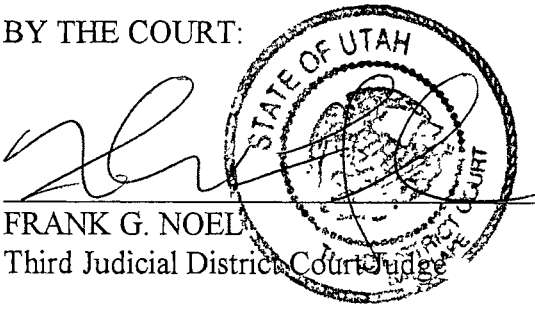
ORDER

The State's motion to dismiss, or for partial summary judgment is **GRANTED**. The petition is untimely under UTAH CODE ANN. § 78-35a-107 and petitioner has failed to demonstrate that the interests of justice should excuse his untimely filing.

Alternatively, each of petitioner's claims fail as a matter of law.

DATED 22 April, 2004.

BY THE COURT:



FRANK G. NOEL
Third Judicial District Court Judge

APPROVED AS TO FORM:

15APR04

Edwin S. Wall
Petitioner's Counsel

CERTIFICATE OF SERVICE

I hereby certify that on 31 March, 2004 I mailed, postage prepaid, an accurate copy of the foregoing proposed ORDER DISMISSING PETITION to:

Edwin S. Wall
8 East Broadway, Suite 500
Salt Lake City, UT 84111

Addendum C

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

STATE OF UTAH,

Plaintiff,

v.

GARY LEE OLIVER,

Defendant.

Case No. 941901063

CHANGE OF PLEA

BE IT REMEMBERED, that on November 10th, 1994, the above entitled cause of action came on regularly for hearing at the hour of 3:00 p.m. of said day before the HONORABLE FRANK G. NOEL, one of the Judges of the above-named Court.

APPEARANCES

For the State: MR. B. KENT MORGAN and
MR. VINCENT MEISTER
Deputy County Attornies
231 East 4th South
Salt Lake City, Utah

For the Defendant: MR. D. GILBERT ATHAY
Attorney At Law
40 East 4th South,#325
Salt Lake City, Utah

WHEREUPON THE FOLLOWING PROCEEDINGS WERE HAD:

THE COURT: Good afternoon, Ladies and Gentlemen. The matter before the court this afternoon is the State of Utah versus Gary Lee Oliver. Is that your correct name, sir?

MR. OLIVER: Yes, your Honor.

THE COURT: Counsel, state your names for the record?

MR. ATHAY: Your Honor, Gilbert Athay appearing on behalf of Mr. Oliver.

MR. MORGAN: Kent Morgan appearing for the state.

THE COURT: This matter is on the court's calendar this afternoon, I have been told, for entry of a plea in this matter.

MR. ATHAY: That's correct, your Honor. We would move the court to permit us to withdraw our plea of not guilty heretofor entered to the Information charging Murder in the First Degree and to permit us to enter a new plea of guilty to that charge.

THE COURT: Very well. Now, Mr. Oliver, have you reviewed a statement with your attorney here today?

MR. OLIVER: Yes, sir.

Q. And have you read it yourself?

A. Yes, sir.

Q. This statement lists certain constitutional rights that you have. Have you reviewed those with your attorney?

A. I have.

THE COURT: Mr. Athay, I'll give this to you (indicating) and you have read those yourself?

MR. OLIVER: Yes, sir.

Q. You understand then, Mr. Oliver, that you're entitled to a speedy trial before an impartial jury on this charge?

A. Yes, sir.

Q. And you're entitled to present evidence at that trial, and for that purpose you can subpoena witnesses and you can require them to be in attendance. you could take the stand and testify in your own behalf at that trial or could remain silent. You could not be forced to testify against yourself;you would be entitled to be confronted by any witnesses against you that may be presented by the prosecution, and through your attorney to cross-examine those witnesses, and to ask them questions. You understand that?

A. Yes, sir.

Q. If you were convicted at that trial you would have the right to appeal that conviction;you understand that?

A. Uh-huh.

Q. Now, if you plead guilty to this charge, you'll be giving up all of those rights and there will not be a trial;and you'll not be able to confront witnesses and will not be able to present evidence. The state will not be required to present any evidence. And you'll be convicted simply by your admission and your plea to me here today. Do you understand that?

A. Yes.

Q. Are you willing to sign the statement?

A. Yes, I am.

Q. Would you do so at this time, please?

MR. ATHAY: Mr. Oliver has signed the statement and Mr. Morgan and I previously signed it. May I approach?

THE COURT: You may. Mr. Oliver, you are forty-four years of age?

MR. OLIVER: Yes, sir.

Q. And completed the twelfth grade?

A. Yes.

Q. Mr. Oliver, this charge that you've been charged with is a First Degree Felony and carries a penalty of from five years up to a maximum of life in prison. Do you understand that?

A. Yes.

Q. It also carries a penalty of up to ten-thousand dollars in fines, plus an 85% surcharge. Are you aware of that?

A. Yes.

Q. Now, I understand that certain recommendations with regard to that sentence may be made to the court. You understand that the court is not bound by those recommendations?

A. Yes, sir.

THE COURT: May be a recommendation that you serve a maximum of not more than one to fifteen years, with a fire arm enhancement rather than a five to life. But you understand that the court is not bound by that recommendation?

MR. OLIVER: Yes.

Q. That all options are open to the court in that the court impose by virtue of your plea here today, a penalty of five to life;do you understand that?

A. Yes.

Q. And no promises have been made to you as to what sentence this court is going to impose?

A. No.

Q. The elements of this offense, Mr. Oliver, are, that you, as defendant, intentionally, knowingly caused the death of another or intending to cause serious bodily injury to another, committed an act clearly dangerous to human life that caused the death. Those are the elements of the offense. In order for you to be found guilty of this offense, the state must prove each one of those elements beyond a reasonable doubt to the jury.

A. Yes.

Q. And they must reach a verdict of guilty unanimously. You understand that?

A. Yes.

Q. Now, if you plead guilty today,however, the state will not be required to make that proof, and you will be convicted by your admission here to me;you understand that?

A. Yes.

Q. Now, they allege some facts, Mr. Oliver, to support this charge. And they state that on or about June twenty-third, 1994 that you, as the defendant, intentionally and knowingly caused the death of Deolyn Oliver or intending to cause serious bodily injury to another committed an act clearly dangerous to human life, that caused the death of Deolyn Oliver. If you plead guilty today, you'll be admitting those facts;do you understand that?

A. Yes, I do.

Q. Now, I want to ask you by way of informing me now more about what occurred on this occasion. If you would tell the court in your own words what occurred.

A. Well,your Honor, we were fighting and I was doin' some drinking. I don't remember everything that happened. I took a pill that was in the cupboard. Not sure what it was and I don't know whether I just blocked it out of my mind--I don't remember a whole lot of it. I realised what happened the next day.

Q. Which was?

A. That I shot and killed her.

THE COURT: Ok. I think we have sufficient facts. Mr. Morgan?

MR. MORGAN: May we approach the bench?

THE COURT: You may.(Whereupon an off the record discussion was held at sidebar . Mr. Oliver and his counsel then conferred off the record at the podium.)

THE COURT: Mr. Athay I think that I gave you the benefit of the record to ask your client---

MR. ATHAY: Thank you, your Honor.

THE COURT: ---the facts of what occurred at this time.

MR. ATHAY: Mr. Oliver, you indicated to the court that you and Deolyn had been at the--you took a pill and had been drinking. Subsequent to that, you did call me on the telephone;is that correct?

MR. OLIVER: Yes.

Q. And you advised me as to what had occurred;is that correct?

A. Yes.

Q. And what did you tell me at that time had occurred?

A. That I had shot my wife and I think she's dead.

Q. And do you remember shooting her?

A. Sort of, yeah.

Q. When you say "sort of", tell the court what you remember happening?

A. Had my repeating-type rifle and shooting my---

Q. You remember anything else before coming--were you angry at the time?

A. Yes.

Q. Did you intend to cause her serious bodily injury when you shot her?

A. I guess I must have.

Q. Ok. And immediately upon shooting, You realised that she was dead;is that right?

A. Yeah.

Q. And you called me and so advised me;is that correct?

A. Yes.

MR. ATHAY: I think that's sufficient, your Honor.

MR. MORGAN: We're satisfied with that fact.

THE COURT: You satisfied, Mr. Morgan?

MR. MORGAN: Yes, your Honor.

THE COURT: All right then. Mr. Oliver, as to Count 1, Criminal Homicide, Murder, First Degree Febny at 209 East Nicoletti Drive, in Salt Lake County, State of Utah, on or about June 23rd, 1994;as to that charge how do you plead?

MR. OLIVER: Guilty.

THE COURT: And you waive that formal reading of the Information?

MR. ATHAY: We do, your Honor.

THE COURT: Now, are you entering that plea voluntarily, Mr. Oliver?

MR. OLIVER: Yes, I am.

Q. Nobody is forcing you to do so?

A. No.

Q. And no one has made any promises to you as to what the sentence of the court will be?

A. No, sir.

THE COURT: Are you presently under the influence of any alcohol or drugs of any kind?

MR. OLIVER: No, sir.

Q. Have you taken anything in the last twenty-four hours?

A. Only some pills over in the jail--telpolin---

Q. What is the---

A. To help me sleep.

MR. ATHAY: They affect your ability to think?

MR. OLIVER: I don't think so.

Q. They affect your ability to make decisions?

A. No.

Q. Do you understand what we're doing here today?

A. Yeah. Yeah.

Q. You and I have spoken about this plea on numerous occasions, have we not?

A. Uh-huh.

Q. And at any time have the pills affected your judgment in deciding whether to enter this plea?

A. No.

THE COURT: Do you feel like you were under the influence of these pills right now? You can understand what it is that I have told you?

MR. OLIVER: No, I understand. I understand.

Q. Do you have any questions about these proceedings so far, Mr. Oliver?

A. No.

MR. ATHAY: May I ask a couple of other questions?

THE COURT: Yes, uh-huh-

MR. ATHAY: They give you these to control mood swings that you have?

MR. OLIVER: I guess that's--I told them I couldn't sleep so they gave me that stuff. I was depressed.

Q. That been as a rule what occurred in this case?

A. Yeah.

Q. And the depression and lack of sleep not something you were concerned about prior to this event occuring?

A. No.

Q. And that those pills were given to alter the moods that you had found yourself in;is that correct?

A. Yes.

THE COURT: Very well. Then the court finds that the plea has been freely, voluntarily and knowingly entered. The court makes that finding based on the defendants' responses to the court's questions and observations of the defendant. And I will sign this statement so indicating my finding. Mr. Oliver, if you intend to ask this court to allow you to withdraw this guilty plea, and the court may or may not allow you to do that;but you must make that request within thirty days. Do you understand that?

MR. OLIVER: Yes, I do.

THE COURT: All right. The court will enter a presentence report in this matter and will set sentencing?

MRS. JONES: January sixth.

THE COURT: January 6th at ten-thirty a.m. Now, you have a right, Mr. Oliver, to be sentenced within thirty days of todays' date. I think it may take that long in order for A P and P to get the presentence report completed. Your sentencing date is beyond the thirty day period. Are you willing to waive that thirty days?

MR. OLIVER: Yes.

THE COURT: And you discussed that with your attorney?

A. Yes.

THE COURT: You in agreement with that also, Mr. Athay?

MR. ATHAY: I am, your Honor. I think it would be appropriate.

THE COURT: Very well. Anything else, Gentlemen?

MR. MORGAN: Ask your Honor, the court to find that the statement of the defendant is part of these proceedings and incorporate that as part of the courts' basis for its' finding of the plea entered in this case of knowingly and voluntarily given.

THE COURT: Very well, I will do that. I believe I indicated that was the finding of the court and signed the statement so indicating.

MR. MORGAN: Thank you, your Honor.

THE COURT: That will be the finding of the court.

MR. ATHAY: Thank you, your Honor. May I be excused?

THE COURT: Yes, you may and court will be in recess.

(WHEREUPON this hearing was concluded.)

C E R T I F I C A T E

SALT LAKE COUNTY)
: ss.
STATE OF UTAH)

I, Hal M. Walton, do hereby certify that I am a Certified Shorthand Reporter of the State of Utah;that on November 10th, 1994, I appeared before the above-named court and reported the hearing contained in the twelve pages of court transcript herein transcribed, the same being a correct rendition of my shorthand notes as reported by me.

H.M. Walton CSR

H.M. Walton C.S.R.

Dated: February 11th, 1999