

2005

Lee Roy Wood v. State of Utah : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Lee Roy Wood; Appellant pro se.

Erin Riley; Assistant Attorney General; Mark L. Shurtleff; Utah Attorney General; Attorneys for Appellee.

Recommended Citation

Brief of Appellee, *Wood v. Utah*, No. 20050221 (Utah Court of Appeals, 2005).
https://digitalcommons.law.byu.edu/byu_ca2/5648

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

| | | |
|------------------------------|----------|-----------------------------|
| LEE ROY WOOD, | : | |
| Petitioner/Appellant, | : | |
| v. | : | Case No. 20050221-CA |
| STATE OF UTAH, | : | |
| Respondent/Appellee | : | |

BRIEF OF APPELLEE

**APPEAL FROM DENIAL OF A PETITION FOR POST-CONVICTION
RELIEF, IN THE EIGHTH JUDICIAL DISTRICT COURT, UINTAH
COUNTY, UTAH, THE HONORABLE A. LYNN PAYNE, PRESIDING**

**ERIN RILEY (#8375)
Assistant Attorney General
MARK L. SHURTLEFF (#4666)
Utah Attorney General
PO BOX 140854
Salt Lake City, Utah 84114-0854**

**Lee Roy Wood, #18439
Central Utah Correctional Facility
PO BOX 550
Gunnison, UT 84634**

Attorney for Respondent/Appellee

Petitioner/Appellant pro se

**FILED
UTAH APPELLATE COURTS
SEP 21 2005**

IN THE UTAH COURT OF APPEALS

LEE ROY WOOD,

:

Petitioner/Appellant,

:

v.

:

Case No. 20050221-CA

STATE OF UTAH,

:

Respondent/Appellee

:

BRIEF OF APPELLEE

APPEAL FROM DENIAL OF A PETITION FOR POST-CONVICTION
RELIEF, IN THE EIGHTH JUDICIAL DISTRICT COURT, UINTAH
COUNTY, UTAH, THE HONORABLE A. LYNN PAYNE, PRESIDING

ERIN RILEY (#8375)

Assistant Attorney General

MARK L. SHURTLEFF (#4666)

Utah Attorney General

PO BOX 140854

Salt Lake City, Utah 84114-0854

Lee Roy Wood, #18439

Central Utah Correctional Facility

PO BOX 550

Gunnison, UT 84634

Attorney for Respondent/Appellee

Petitioner/Appellant pro se

TABLE OF CONTENTS

| | Page |
|--|------|
| TABLE OF AUTHORITIES | ii |
| JURISDICTIONAL STATEMENT AND NATURE OF PROCEEDINGS | 2 |
| ISSUES ON APPEAL AND STANDARDS OF REVIEW | 2 |
| CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES | 3 |
| STATEMENT OF THE CASE | 3 |
| STATEMENT OF THE FACTS | 6 |
| SUMMARY OF THE ARGUMENT | 8 |
| ARGUMENT | |
| I. PETITIONER’S CLAIM SHOULD BE DISMISSED BECAUSE IT IS INADEQUATELY BRIEFED. | 9 |
| II. THE PETITION FOR POST-CONVICTION RELIEF WAS PROPERLY DISMISSED. | 13 |
| A. Although the post-conviction court reached the merits, this Court should affirm on the alternative basis that petitioner waived his claim concerning 120-day disposition by pleading guilty. | 13 |
| B. Petitioner is not entitled to relief based on his allegations concerning 120-day disposition. | 17 |
| CONCLUSION | 19 |
| ADDENDA | |
| Addendum A: Ruling dated February 9, 2005 | |
| Addendum B: Utah Code Ann. § 77-29-1 | |

TABLE OF AUTHORITIES

FEDERAL CASES

| | |
|---|--------|
| <i>Atkins v. Virginia</i> , 536 U.S. 304, 122 S. Ct. 2242 (2002) | 5 |
| <i>McCarthy v. United States</i> , 394 U.S. 459 (1969) | 14 |
| <i>Menna v. New York</i> , 423 U.S. 61, 96 S. Ct. 241, 46 L. Ed. 2d 195 (1975) | 16 |
| <i>Moll v. Carter</i> , 179 F.R.D. 609 (1998) | 10 |
| <i>Tollett v. Henderson</i> , 411 U.S. 258, 93 S. Ct. 1602, 36 L. Ed. 2d 235 (1973) | 14, 16 |
| <i>Whitney v. State of N.M.</i> , 113 F.3d 1170 (10th Cir. 1997) | 10 |

STATE CASES

| | |
|---|-------|
| <i>Bailey v. Bayles</i> , 2002 UT 58, 52 P.3d 1158 | 13 |
| <i>Crookston v. Fire Insurance Exch.</i> , 817 P.2d 789 (Utah 1991) | 12 |
| <i>MacKay v. Hardy</i> , 973 P.2d 941 (Utah 1998) | 10 |
| <i>Matthews v. Galetka</i> , 958 P.2d 949 (Utah App. 1998) | 3, 12 |
| <i>Phillips v. Hatfield</i> , 904 P.2d 1108 (Utah App. 1995) | 10 |
| <i>Salazar v. Warden</i> , 852 P.2d 988 (Utah 1993) | 14 |
| <i>State v. Alvarez</i> , 872 P.2d 450 (Utah 1994) | 12 |
| <i>State v. Benvenuto</i> , 983 P.2d 556 (Utah 1999) | 12 |
| <i>State v. Bryant</i> , 965 P.2d 539 (Utah App. 1998) | 11 |
| <i>State v. Gamblin</i> , 2000 UT 44, 1 P.3d 1108 | 2, 10 |
| <i>State v. Gardner</i> , 844 P.2d 293 (Utah 1992) | 12 |
| <i>State v. Germonto</i> , 868 P.2d 50 (Utah 1993) | 10 |

| | |
|--|--------|
| <i>State v. Gibbons</i> , 740 P.2d 1309 (Utah 1987) | 14 |
| <i>State v. Jaeger</i> , 973 P.2d 404 (Utah 1999) | 11, 13 |
| <i>State v. Parsons</i> , 781 P.2d 1275 (Utah 1989) | 14 |
| <i>State v. Price</i> , 827 P.2d 247 (Utah App. 1992) | 10 |
| <i>State v. Sery</i> , 758 P.2d 935 (Utah App. 1988) | 14 |
| <i>State v. Snyder</i> , 932 P.2d 120 (Utah App. 1997) | 10 |
| <i>State v. Thomas</i> , 961 P.2d 299 (Utah 1998) | 11 |
| <i>State v. Wareham</i> , 772 P.2d 960 (Utah 1989) | 10, 11 |
| <i>State v. Yates</i> , 834 P.2d 599 (Utah App. 1992) | 11 |

STATE STATUTES

| | |
|--|---------------|
| Utah Code Ann. § 77-29-1 (West 2005) | 3, 14, 18, 19 |
| Utah Code Ann. §78-2a-3 (West 2005) | 2 |
| Utah R. App. P. 24 | 10 |

IN THE UTAH COURT OF APPEALS

| | | |
|------------------------------|---|-----------------------------|
| LEE ROY WOOD, | : | |
| Petitioner/Appellant, | : | |
| v. | : | |
| | | Case No. 20050221-CA |
| STATE OF UTAH, | : | |
| Respondent/Appellee | : | |

BRIEF OF APPELLEE

JURISDICTIONAL STATEMENT AND NATURE OF PROCEEDINGS

This is an appeal from a district court order dismissing a petition for post-conviction relief, which challenged convictions for Aggravated Murder, a capital offense, two counts of Attempted Aggravated Murder, first degree felonies, and Aggravated Kidnaping, a first degree felony. This Court has jurisdiction under Utah Code Ann. §78-2a-3(j) (West 2005).

ISSUES ON APPEAL AND STANDARDS OF REVIEW

Issue I: Should petitioner’s claims be dismissed because they are inadequately briefed?

Standard of Review: “Briefs that do not comply with rule 24 ‘may be disregarded or stricken, on motion or sua sponte by the court.’ Utah R. App. P. 24(j).” *State v. Gamblin*, 2000 UT 44, ¶ 8, 1 P.3d 1108.

Issue II: Did the district court properly deny and dismiss the petition for post-conviction relief?

Standard of Review: The following standard of review applies:

Our standard of review for an appeal from a dismissal of a petition for post-conviction relief depends on the issue appealed. Though we review the trial court's conclusions of law for correctness, we will disturb findings of fact only if they are clearly erroneous. Further, “we survey the record in the light most favorable to the findings and judgment; and we will not reverse if there is a reasonable basis therein to support the trial court's refusal to be convinced that the writ should be granted.”

Matthews v. Galetka, 958 P.2d 949, 950 (Utah App. 1998) (citations omitted).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The following constitutional provisions, statutes, and rules relate to this appeal:

Addendum B - Utah Code Ann. § 77-29-1 (Prisoner's demand for disposition).

STATEMENT OF THE CASE

On July 10, 2001, petitioner Wood was charged by Information with one count of Criminal Homicide, Aggravated Murder, a capital offense; two counts of Attempted Criminal Homicide, Aggravated Murder, first degree felonies; one count of Aggravated Kidnaping, a first degree felony; one count of Aggravated Assault, a third degree felony; and one count of Purchase, Transfer, Possession or Use of a Firearm by Restricted Person, a second degree felony. In addition, notice was given that the State intended to seek the firearm sentencing enhancement (R. 338-342).

On August 15, 2001, a telephone conference was held. The prosecutor and counsel for Wood asked the court to set the preliminary hearing on December 10th and 11th, 2001. The preliminary hearing was set for those dates (R. 335-36).

On November 28, 2001, petitioner's counsel advised the court that they believed Wood needed to have a competency evaluation before proceeding with the preliminary hearing (R. 332-33). They therefore requested that the preliminary hearing be continued. The preliminary hearing was re-scheduled for January 22, 2002. Id.

On December 13, 2001, the Order granting the petition for competency evaluation was filed (R. 329-30). The competency evaluation was not completed in time for the scheduled January 22nd preliminary hearing (R. 326-27). The preliminary hearing was re-scheduled for April 4-5, 2002. Id.

On March 8, 2002, Wood was found competent (R. 322-24). The preliminary hearing was held on April 4, 2002 (R. 316-20). The Court again noted on the record that it found Wood to be competent. Id. Wood was bound over for trial (R. 313-14).

Various motions were filed and addressed. On August 16, 2002, the parties filed a written stipulation to change venue (R. 310-11). At a hearing on August 19, 2002, counsel for Wood made a motion to vacate the jury trial date because the new venue needed to be determined, and also because there was a Bill before the legislature dealing with mental health issues, and they wanted the jury trial set after the legislature made a decision as to

whether or not that Bill would pass (R. 307-8). The trial date was continued and Wood stated on the record that he waived his right to a speedy trial. Id.

On August 20, 2002, the parties were notified that if the case were transferred to the Fourth District Court in Heber, Utah, it would be March 2003 before the jury trial could be set (R. 304-5). Petitioner's counsel stated that Wood had no objection to a March 2003 trial setting. Id. The court approved the transfer of the case to Fourth District Court in Heber, Utah. Id. However, the case was never actually transferred, because Wood pled guilty.

On September 19, 2002, counsel for Wood withdrew the motion for change of venue and also withdrew a motion to suppress (R. 298).¹ Wood pled guilty to counts I, II, and III. As part of the plea agreement, "the maximum penalty would be life in prison without parole. Mr. Wood would concede as part of the plea that was the appropriate sentence." (R. 299). Also as part of the plea agreement, the remaining counts would be dismissed (R. 266).

The Court asked the parties if they would like to discuss Atkins.² The parties indicated that they did not (R. 257-59). Wood waived the time period for sentencing and requested that sentencing take place that same day. Id.

¹ The original transcript of the plea and sentencing hearing on September 19, 2002 is in the court file in case no. 011800225. The transcript includes conversations which the court and parties stated were in chambers and not on the record. Because the State's memorandum in support of its motion to dismiss would be a public record, only the portion of the transcript that was considered "on the record" was included as addendum L (R. 274-302).

² Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242 (2002).

On September 19, 2002, shortly after entering his plea, Wood was sentenced to life in prison without parole on the Aggravated Murder charge, and five years to life on each of the Attempted Aggravated Murder charges. The sentences were to run consecutively (R. 248-50, 252-55 & 287).

Wood did not file any timely motion to withdraw plea or any timely notice of appeal. On December 10, 2002, Wood filed a pro se motion to withdraw plea (R. 241-46). He filed an amended motion to withdraw plea on January 9, 2003 (R. 236-39). On January 29, 2003, the motion to withdraw plea was denied because it was untimely (R. 233-34). Wood apparently did not appeal the denial of his motion to withdraw plea.

On July 16, 2003, Wood filed a state petition for post-conviction relief (R. 7-16). On April 7, 2004, Wood filed a pro se amended petition for post-conviction relief (R. 88-97). In response, the State filed a motion to dismiss and supporting memorandum (R. 225-369). On February 9, 2005, the district court entered its ruling, which granted the State's motion to dismiss (R. 395-406) (addendum A).

STATEMENT OF THE FACTS³

"On 07-06-01 Lee Roy Wood obtained an SKS rifle from the Mike Swett residence located at 1757 West 750 North. Lee also met with an individual who will be referred to as 'K.P.' While at the Swett residence K.P. and Wood began to argue. This argument resulted

³ The facts are taken from the probable cause statement (R. 230-31). The facts are double spaced for ease of reading.

in Wood pointing the SKS rifle at K.P., threatening to kill her, and ordering K.P. to get into a truck and drive.

K.P. did as instructed. K.P. and Wood then traveled West on Highway 40. While traveling West on Highway 40 the fight continued and K.P. was physically assaulted by Wood. Wood allowed K.P. to stop at the Maverik convenience store to use the restroom. Wood followed K.P. into the convenience store and waited near the bathroom door. As K.P. exited the restroom, Wood rapidly paid for items purchased, exited the store, and again began to verbally abuse K.P. This argument continued, and according to witnesses Wood retrieved the SKS rifle from the vehicle and pointed the rifle at K.P. Wood then ordered K.P. back into the vehicle to leave the area.

During the argument Law Enforcement was contacted by a witness.

K.P. entered the vehicle, backed out of the parking lot onto Union Street, and stopped due to the arrival of Police Officers.

Upon the arrival of Law Enforcement Officers K.P. stopped the vehicle, and Wood exited the vehicle from the passenger side door of the truck. Wood retrieved the SKS firearm from the vehicle and aimed the rifle at Roosevelt Police Officer Henry McKenna. Wood then began pulling the trigger of the rifle attempting to shoot Officer McKenna. Wood then realized that the rifle did not have a live round in the chamber. Wood activated the weapon and shifted the rifle to his left aiming it at Roosevelt Police Officer Lance Williamson. As Wood was aiming the rifle at Williamson, he was verbally challenged by Roosevelt Police

Chief Cecil Gurr. As he was verbally challenged, Wood diverted his attention to Chief Gurr, aimed the rifle at Chief Gurr and fired a total of five (5) rounds, one of which struck Chief Gurr in the head causing death. Wood then got back into the passenger side of the truck and ordered K.P. to drive due to the fact that he had just shot a police officer.

As K.P. was driving West on Highway 40 Wood was pointing the rifle at her. As Wood sat the rifle on the seat, K.P. seized the opportunity to grab the rifle and throw it out the window. The suspect vehicle was stopped by Roosevelt Police Officers near 350 East 400 North in Roosevelt City and Lee Roy Wood was taken into custody. While at this location Wood made a comment to Officer McKenna indicating that Officer McKenna was the first Officer that he attempted to murder, and that he hoped the Officer he'd shot would die.

It should be noted that Lee Roy Wood is currently on Federal Probation, State Parole, and is a convicted Felon who cannot possess a firearm.” (R. 230-31).

SUMMARY OF THE ARGUMENT

Petitioner's claims should be dismissed because they are inadequately briefed. Petitioner does not appropriately challenge the decision of the district court, but merely attempts to raise the same argument he raised in his petition for post-conviction relief. Rather than provide meaningful legal analysis, petitioner merely asserts facts and opinions that he believes support his claim and concludes that he is entitled to relief. This does not conform to the requirements of the briefing rule.

Even if petitioner's brief is not dismissed for inadequacy, the decision of the district court should be affirmed because the petition for post-conviction relief was properly denied and dismissed. The district court ruled correctly that there was good cause for failing to bring the matter to trial within 120 days (addendum A). In the alternative, the decision of the district court should be affirmed because petitioner waived any claim concerning 120-day disposition by entering his guilty plea without raising the issue.

ARGUMENT

I. PETITIONER'S CLAIM SHOULD BE DISMISSED BECAUSE IT IS INADEQUATELY BRIEFED.

Petitioner appeals the dismissal of his petition for post-conviction relief. However, in his appellate brief, petitioner simply raises one of the arguments he raised in his post-conviction petition. Petitioner does not challenge the decision of the district court. He has not argued or established that any of the court's findings were clearly erroneous, or that its conclusions of law were incorrect. Rather than provide meaningful legal analysis, petitioner merely asserts facts and opinions that he believes support his claim, and then concludes that he is entitled to relief. This does not conform to the requirements of the briefing rule.

Inadequate Briefing. Rule 24 (a)(9), Utah Rules of Appellate Procedure, requires an appellant to include his "contentions and reasons . . . with respect to the issues presented," including "citations to the authorities, statutes and parts of the record relied on." This Court

does not address issues inadequately briefed under this rule.⁴ See *State v. Gamblin*, 2000 UT 44, ¶ 6, 1 P.3d 1108 (refusing to consider argument which is inadequately briefed); *MacKay v. Hardy*, 973 P.2d 941, 947-48 (Utah 1998).

Utah courts have consistently held that issues not properly briefed should not be addressed on appeal. See *State v. Wareham*, 772 P.2d 960, 966 (Utah 1989). “A reviewing court is entitled to have the issues clearly defined with pertinent authority cited.” *State v. Snyder*, 932 P.2d 120, 130 (Utah App. 1997) (citing *State v. Bishop*, 753 P.2d 439, 450 (Utah 1988)).

Petitioner has not properly briefed the issue. His brief does not identify any specific error by the district court. It does not cite to the record; nor does it cite applicable authority. It also does not provide any meaningful legal **analysis**. See *State v. Price*, 827 P.2d 247 (Utah App. 1992); *Phillips v. Hatfield*, 904 P.2d 1108 (Utah App. 1995).

Petitioner nowhere provides an analytical basis for his claim that the dismissal of his petition for post-conviction relief should be overturned on appeal. See Utah R. App. P. 24(a)(9) (providing that argument section of appellant’s brief must “contain the contentions and reasons of the appellant with respect to the issues presented . . . with citations to the

⁴ The State acknowledges that pro se briefs must be construed liberally. See *Moll v. Carter*, 179 F.R.D. 609, 610 (1998); *Whitney v. State of N.M.*, 113 F.3d 1170, 1173 (10th Cir. 1997). However, pro se litigants must still comply with minimal standards. *Id.* If errors alleged in the pro se brief, even if properly presented, would not amount to reversible error, they do not require full analysis. See *State v. Germonto*, 868 P.2d 50, 55 (Utah 1993).

authorities, statutes, and parts of the record relied on”); *see also State v. Thomas*, 961 P.2d 299, 305 (Utah 1998) (holding that “rule 24(a)(9) requires not just bald citation to authority but development of that authority and reasoned analysis based on that authority”); *State v. Wareham*, 772 P.2d 960, 966 (Utah 1989) (holding that brief “must contain some support for each contention”).

In sum, this Court is not “a depository in which the appealing party may dump the burden of argument and research.” *State v. Jaeger*, 973 P.2d 404, 410 (Utah 1999) (quoting *State v. Bishop*, 753 P.2d 439, 450 (Utah 1988)), and *see Thomas*, 961 P.2d at 305. Accordingly, petitioner’s claim should be rejected. *See Jaeger*, 973 P.2d at 410 (refusing to consider appellant’s claim due to the lack of meaningful analysis of cited authority); *Wareham*, 772 P.2d at 966 (refusing to address claim on appeal where petitioner’s brief “wholly [lacked] legal analysis and authority to support his argument”); *State v. Bryant*, 965 P.2d 539, 548-49 (Utah App. 1998) (same); *State v. Yates*, 834 P.2d 599, 602 (Utah App. 1992) (same).

Failure to Marshal. Petitioner’s claim also fails because his grounds for relief ignore the district court’s findings and conclusions in support of its rulings (R. 395-406) (Addenda A). The law is well-settled that although the Court of Appeals will “review the trial court’s conclusions of law for correctness, [it] will disturb findings of fact only if they are clearly erroneous. Further, “we survey the record in the light most favorable to the findings and judgment; and we will not reverse if there is a reasonable basis therein to

support the trial court's refusal to be convinced that the writ should be granted.”””” *Matthews v. Galetka*, 958 P.2d 949, 950 (Utah App. 1998) (citations omitted).

A court’s findings are “clearly erroneous only if they ‘are against the clear weight of the evidence’” or if the reviewing court “‘reaches a definite and firm conviction’” that they are mistaken. *State v. Gardner*, 844 P.2d 293, 295 (Utah 1992) (quoting *State v. Walker*, 743 P.2d 191, 193 (Utah 1987)). The burden is on the petitioner to marshal all of the evidence in support of the district court’s findings and then to demonstrate that the evidence does not support the findings. *State v. Alvarez*, 872 P.2d 450, 460-61 (Utah 1994). If the petitioner makes no attempt to marshal the evidence supporting the court’s ruling and to demonstrate its insufficiency, this Court “accept[s] the trial court’s findings as stated in its ruling.” *State v. Benvenuto*, 983 P.2d 556, 558 (Utah 1999).

Petitioner fails to carry his burden. He refers only to facts or events which he believes are favorable to his position and then broadly asserts that contrary to the district court’s ruling, he is entitled to relief. Because petitioner has failed to marshal the supporting evidence and demonstrate its insufficiency, this Court should accept the district court’s findings. *Benvenuto*, 983 P.2d at 558.

In sum, petitioner’s claim is inadequately briefed and neither marshals the evidence supporting the district court’s findings, nor demonstrates its inadequacy. Therefore, this Court should decline to consider petitioner’s challenge to the district court’s ruling dismissing his petition for post-conviction relief. See *Crookston v. Fire Ins. Exch.*, 817 P.2d

789, 800 (Utah 1991) (failure to marshal evidence); *Jaeger*, 973 P.2d at 410 (failure to meaningfully analyze claims).

II. THE PETITION FOR POST-CONVICTION RELIEF WAS PROPERLY DISMISSED.

Even if this Court were to excuse the failures of petitioner's brief, review of the action below nevertheless establishes that the petition for post-conviction relief was properly dismissed.⁵

A. Although the post-conviction court reached the merits, this Court should affirm on the alternative basis that petitioner waived his claim concerning 120-day disposition by pleading guilty.

The post-conviction court reached the merits of the 120-day disposition issue before dismissing the petition for post-conviction relief. However, "[i]t is well settled that an appellate court may affirm the judgment appealed from 'if it is sustainable on any legal ground or theory apparent on the record, even though such ground or theory differs from that stated by the trial court to be the basis of its ruling.'" *Bailey v. Bayles*, 2002 UT 58, ¶10, 52 P.3d 1158 (quoting *Dipoma v. McPhie*, 2001 UT 61, ¶ 18, 29 P.3d 1225).

The only issue petitioner raises on appeal is that his case was not brought to trial within 120 days. However, his case never went to trial. Instead, petitioner chose to enter a guilty plea, without raising any claim concerning his request for 120-day disposition.

⁵ The post-conviction court ruled on several other issues that petitioner has not raised on appeal. Therefore, they are not at issue in this appeal.

In the memorandum in support of its motion to dismiss, the State argued that petitioner was not entitled to post-conviction relief because he had waived any claim concerning 120-day disposition by entering his guilty plea (R. 358-59). The dismissal of the petition for post-conviction relief should be affirmed on this alternative basis.

It is well settled that a voluntary guilty plea constitutes a waiver of all non-jurisdictional defects, including pre-plea constitutional violations. *See State v. Parsons*, 781 P.2d 1275, 1278 (Utah 1989); *State v. Sery*, 758 P.2d 935, 938 (Utah App. 1988). The 120-day disposition rule is not jurisdictional. In fact, it is not even a constitutional right. It is a state statutory provision. Utah Code Ann. § 77-29-1 (West 2005) (addendum B). Therefore, entry of a guilty plea waived any allegation of violation of the 120-day disposition statute.

A voluntary guilty plea constitutes an admission of the elements of the offense. *See McCarthy v. United States*, 394 U.S. 459, 466 (1969). *Accord, Salazar v. Warden*, 852 P.2d 988, 991 (Utah 1993); *State v. Gibbons*, 740 P.2d 1309, 1313 (Utah 1987). When “a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.” *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973).

By entering his guilty plea, petitioner Wood waived any claim concerning alleged violations of his request for 120-day disposition. The fact that he was waiving his rights by

pleading guilty was clearly explained to him. At the time of entry of his guilty plea, the following exchange occurred:

THE COURT: You give up your right to appeal on any claim of evidence gathered in violation of your constitutional rights. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that if evidence was gathered in violation of your constitutional rights, that evidence would be suppressed and not be available to the prosecution at the time of trial? Do you understand that?

THE DEFENDANT: Yes.

THE COURT: So when I tell you you give up your right to appeal on that basis, you give up the right to challenge the evidence in violation of your constitutional rights. Do you understand that, sir?

THE DEFENDANT: Yes, sir.

* * *

THE COURT: I want to point out at this time your limited basis for appeal at this point. Because there isn't any trial, there aren't any issues you could appeal, which may have arisen at the time of the trial. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: I made it clear, you give up your right to an appeal based upon the ruling of the court, and based upon any violation of constitutional rights. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Also you give up your rights with respect to the issue of suppression that we dealt with, because that's been withdrawn. Do you understand that?

THE DEFENDANT: Yes, sir.

(R. 294-95).

The issue after a defendant pleads guilty is not the merits of any possible pre-plea claims, but whether the guilty plea was made intelligently and voluntarily and with the advice of competent counsel. *Tollett*, 411 U.S. at 265. "A counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case. In most cases, factual guilt is a sufficient basis for the State's imposition of punishment. A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction if factual guilt is validly established." *Menna v. New York*, 423 U.S. 61, n.2, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975).

By entering his guilty plea, petitioner Wood waived all non-jurisdictional defects. He therefore waived any allegations concerning 120-day disposition. He therefore was not entitled to post-conviction relief based on any allegations concerning 120-day disposition. This court should affirm the decision of the district court which dismissed the petition for post-conviction relief.

B. Petitioner is not entitled to relief based on his allegations concerning 120-day disposition.

Even if petitioner had not waived his claim concerning 120-day disposition, he was still not entitled to post-conviction relief. On appeal, petitioner argues that the district “court misunderstood the whole 120 day issue.” (pet.’s brief at 1). He claims that he “[p]lainly stated that it was the Utah State Prison’s Agent that misfiled the 120 day disposition, not the county attorney office or the court.” *Id.* Petitioner then broadly asserts that because the “agent Plaintiff failed to file the 120 day disposition” he “believes he is entitled to relief.” *Id.* at 3.

However, petitioner ignores or perhaps misinterprets the district court’s ruling on this issue. The district court noted that “the Notice which Petitioner claims he filed at the prison was not filed with the Court; nor was the Court informed that a Notice had been filed. Therefore, the criminal case proceeded without any consideration of the unlawful detainer statute. Because Petitioner did not file a Motion to Dismiss, the State was similarly not aware of the filing of the Notice. Consequently, the State was not given an opportunity to request that the trial be held within the statutory period.” (R. 404).

Nevertheless, for purposes of the State’s motion to dismiss, the district court assumed that petitioner filed his 120-day disposition notice with the prison on 7/20/01, that he requested his counsel to file a motion to dismiss, and that counsel failed to file a motion to dismiss (R. 404). The district court therefore analyzed the issue as if the request for 120-day disposition had been properly filed. The district court determined that even if the request for

120-day disposition had been properly filed on the date petitioner alleges he gave the notice to the prison, petitioner would not be entitled to relief.

The district court went through a lengthy review where it set out the matters that occurred in the criminal case from the time that petitioner alleges he filed his notice for 120-day disposition until he entered his guilty plea (R. 396-404, addendum A). The district court discussed continuances and the reasons for those continuances; the request for a competency evaluation; the designation of expert witnesses; motion to retain Dan Jones to conduct a survey; and numerous other motions such as motion to quash the bindover, motion to exclude victim impact evidence, motion to strike the death penalty, motion regarding death qualification of the jury, motion to bifurcate count six, motion to exclude photographs, motion to exclude bad acts, and motion for jury view of scene. In addition, defense counsel requested a motion for change of venue and defense counsel told the court he had no objection to a March 2003 trial (R. 396-404, addendum A).

The statute provides that even after a written demand for 120-day disposition is delivered as required, the parties “for good cause shown . . . may be granted any reasonable continuance.” Utah Code Ann. § 77-29-1(3). Following its lengthy review, the district court determined that if the time periods for certain continuances were excluded, it “would reduce the time below the 120 day threshold.” (R. 398).

The statute also provides that if the court finds that the failure to have the matter heard within the time required “is not supported by good cause” it shall order the matter dismissed.

Utah Code Ann. § 77-29-1(4). The district court determined that even assuming the matter was not heard within 120 days, there was “good cause” for failing to bring the matter to trial within 120 days (R. 396-98).

Finally, the district court also concluded that counsel was not ineffective for failing to file a motion to dismiss (R. 396).


To be entitled to relief on appeal, petitioner must establish that the district court’s findings of fact are clearly erroneous, or that its conclusions of law are incorrect. Petitioner has failed to meet this burden. Petitioner has failed to establish that the ruling by the district court was incorrect. Therefore, this Court should affirm the district court’s dismissal of the petition for post-conviction relief.

CONCLUSION

Based on the arguments set forth above, the State asks this Court to affirm the district court’s dismissal of the petition for post-conviction relief.

RESPECTFULLY SUBMITTED this 21st day of September, 2005.

MARK L. SHURTLEFF
ATTORNEY GENERAL

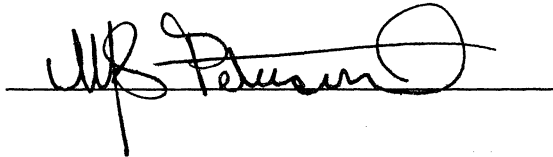

ERIN RILEY
ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I hereby certify that on this 21 day of September 2005, I mailed, postage prepaid,
two accurate copies of the foregoing Respondent/Appellee's Brief to:

Lee Roy Wood, # 18439
Central Utah Correctional Facility
PO BOX 550
Gunnison, UT 84634

Petitioner/Appellant pro se



Addenda


Addendum A

**IN THE EIGHTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH**

| | | | |
|----------------|---|---------------------|--|
| LEE ROY WOOD, | : | RULING | |
| | : | | |
| Petitioner, | : | | |
| | : | | |
| vs. | : | | |
| | : | | |
| STATE OF UTAH, | : | Case No.: 030800480 | |
| | : | | |
| Respondent | : | | |

FILED
DISTRICT COURT
UINTAH COUNTY, UTAH

FEB 09 2005

BY JOANNE McKEE, CLERK
 DEPUTY

This matter comes before the Court on the Respondent's Motion to Dismiss. Previously Judge Anderson has ruled upon the Petitioner's Claim that Counsel was ineffective in not filing an appeal when the Court did not recuse itself on its own motion. The initial Petition also raised issues as to whether the Petitioner entered his plea voluntarily and whether the Petitioner's counsel was ineffective in failing to inform him of the decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). The Amended Petition raised additional issues as to whether Petitioner's trial counsel was ineffective for failing to file a Motion to Dismiss under 77-29-1; (The State unlawful detainer statute). There is also some language which indicates that the Petitioner claims that his Constitutional Right to a speedy trial was violated. There are, therefore, four issues currently before the Court. In his Amended Petition the Petitioner lists grounds (a) through (k) as grounds for relief. Except for the two issues identified in the foregoing paragraph, the Petitioner has not provided any allegations, legal analysis, evidence, or case law to support his allegations in the Amended Complaint. Furthermore, as Respondent argues, the Petitioner's guilty plea effectively waived all non-jurisdictional pre-plea defects, including pre-plea constitutional violations.¹ Therefore, all claims in the Amended Complaint except the issues relating to speedy trial are dismissed.

1. Plea Entered Unlawfully and Involuntarily

As stated above, the Petitioner claims he entered his guilty plea in order to avoid the death penalty. The Petitioner further claims that he is mentally retarded and would not be subject to the death penalty pursuant to the *Atkins* decision. Petitioner argues that, had he been made aware of *Atkins* and its implications, he would not have entered the guilty plea.

¹See *State v. Parsons*, 781 P.2d 1275, 1278 (Utah 1989); *State v. Sery*, 758 P.2d 935, 938 (Utah App. 1988)

The Petitioner has not provided any evidence that indicates he qualifies as mentally retarded pursuant to *Atkins*. In *Atkins*, the Supreme Court stated, "'Mild' mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70." (quoting the American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 41, 42-43 (4th ed. 2000)). *Id.* at 309 n.3). The only evidence before the Court regarding the Petitioner's IQ level is that provided by Dr. Eric Neilson. Dr. Neilson reports that the Petitioner "was administered the Shipley Institute of Living Scale. He generated an estimated IQ of 81 which would place him in the low average range." The Petitioner has not provided any other evidence to show that he is mentally retarded and would not be subject to the death penalty pursuant to *Atkins*. Therefore, the Petitioner's argument that he entered the guilty plea to avoid a punishment that he was not subject to (the death penalty) fails.

Pursuant to *Atkins*, Utah has enacted UTAH CODE ANN. § 77-15a-101, which, consistent with *Atkins*, provides that a defendant who is found to be mentally retarded is not subject to the death penalty. Furthermore, UTAH CODE ANN. § 77-15a-102 provides a defendant is mentally retarded if:

- (1) the defendant has significant sub-average general intellectual functioning that results in and exists concurrently with significant deficiencies in adaptive functioning that exist primarily in the areas of reasoning or impulse control, or in both of these areas; and
- (2) the sub-average general intellectual functioning and the significant deficiencies in adaptive functioning under Subsection (1) are both manifested prior to age 22.

Again, there are no facts before the Court which would show the Petitioner qualifies as mentally retarded pursuant to this statute. The only facts before the Court regarding this issue are those found in Dr. Eric Neilson and Dr. John Malouf's reports, which do not conclude the Petitioner is mentally retarded. Additionally, the Petitioner does not argue that the statute does not comply with *Atkins*. Based upon these facts, the Respondent's Motion to Dismiss is Granted as to this issue.

2. Ineffective Assistance of Counsel - (~~*Atkins*~~)

The Petitioner argues counsel did not inform him regarding the *Atkins* decision. Petitioner claims that he would not have entered his plea if he had been made aware of the implications of that decision.

To meet his burden with respect to ineffective assistance of counsel, the Petitioner must show that his attorney's performance was deficient through an objective standard of reasonableness, and the deficient performance prejudiced his case. The mere bald allegations of ineffective assistance of counsel are not sufficient to support this ground for relief. Again, Petitioner has not provided any evidence or alleged facts which would implicate the State statute

(77-15a-102) or *Atkins*. Therefore, it can not be said that counsel's performance was deficient for failure to inform the Petitioner regarding *Atkins* as he is not an individual within the protection of *Atkins*. Petitioner's trial counsel was clearly aware of *Atkins* and its potential implications in this matter. During the plea hearing the Court and defense counsel specifically discussed *Atkins* and its potential implications. However, defense counsel ultimately stated, "There's nothing in that case that precludes what were about to do." As previously stated, the only evidence before the Court regarding the Petitioner's status as mentally retarded is provided in the psychological evaluations of Dr. Malouf and Dr. Neilson, which do not establish the Petitioner as mentally retarded under *Atkins* or 77-15a-102. This claim fails and the Motion to Dismiss is granted as to this issue.

3. Ineffective Assistance of Counsel (120 day detainer - 77-29-1):

The Petitioner claims that counsel was ineffective in failing to file a Motion to Dismiss under the unlawful detainer statute (77-29-1). In support of this claim, the Petitioner alleges: (1) He filed Notice with the State Prison on 7/20/01; (2) After 120 days had elapsed (and prior to his plea) he requested counsel to file a Motion to Dismiss; and (3) Counsel failed to file a Motion to Dismiss. While there may well be contested issues of fact as to whether an appropriate notice was filed and/or whether the Petitioner asked counsel to file a Motion to Dismiss; for the purposes of this Motion the Court will assume these as facts proved. A review of the record shows that the Petitioner did not file a Motion to Dismiss.

With respect to this issue the Court will note that the Notice which Petitioner claims he filed at the prison was not filed with the Court; nor was the Court informed that a Notice had been filed. Therefore, the criminal case proceeded without any consideration of the unlawful detainer statute. Because Petitioner did not file a Motion to Dismiss, the State was similarly not aware of the filing of the Notice. Consequently, the State was not given an opportunity to request that the trial be held within the statutory period.

It will also be useful to consider the statute itself. The statute (77-29-1) is not implicated until: (1) A Defendant files an appropriate notice; (2) The trial is not held within 120 days; (3) The Defendant files a Motion to Dismiss; (4) The Trial Court reviews the record and finds that the failure to hold the trial within 120 days was not supported by good cause. The Defendant has the burden to prove a notice was properly filed. The statute allows for "Reasonable continuances" for "good cause". (77-29-1(3)) However, the statute requires that the continuances be approved "...in open Court, with the prisoner or his counsel being present." The burden to prove that a continuance was approved pursuant to subsection (3) rests with the State. Even where the 120 day period has elapsed the case may be dismissed only (1) When the Defendant files a Motion to Dismiss for failure to bring the matter to trial within 120 days and (2) The Trial Court reviews the record and finds "...that the failure of the prosecutor to have the matter heard within the time is not supported by good cause." (77-29-1(4)). Good cause under subsection (4) exists whenever delay is wholly attributable to the Defendant, State v. Heaton 958 P.2d 115 (Utah 1982); State v. Valesquez, 641 P.2d 115 (Utah 1982); State v. Jensen, 818 P.2d 551 (Utah

1991). The State bears the burden of showing that there was good cause for failing to bring the matter to trial within 120 days.

The issue before the court is whether trial counsel was ineffective in failing to file a Motion to dismiss. Because the Petitioner did not file a Motion to Dismiss, he does not (at this time) argue that he is entitled to dismissal by reason of the operation of the statute. Instead, Petitioner seeks to have his plea set aside based upon his claim that counsel was ineffective. With respect to the issue of ineffective assistance, the Petitioner bears the burden to prove that his attorney's performance was deficient and that the deficient performance prejudiced the Petitioner. In considering these issues it will be helpful to establish a time line relating to the running of the 120 day period.

1. July 20, 2001. Petitioner filed his Notice for 120 day disposition with the Warden at the Utah State Prison.

2. August 15, 2001. Defense Counsel had been tentatively selected but had not been formally appointed pursuant to Rule 8 U.R.Cr.P. Counsel stipulated to setting the Preliminary Hearing on December 10th and 11th, 2001. Elapsed time from paragraph 1 above (7-20-01 to 8-15-01) 26 days.

3. September 11, 2001. Court conducted a Rule 8 (U.R.Cr.P.) hearing and formally appointed defense counsel (Mr. Brass and Mr. Bugden). The parties stipulated to a trial date of 9/20/2002. Elapsed time from paragraph 2 above (8-15-01 to 9-11-01) 27 days.

4. November 28, 2001. Defense Counsel requested a competency evaluation. Elapsed time from paragraph 3 above (9-11-01 to 11-28-01) 78 days. Defense Counsel requested that the Preliminary Hearing be delayed until after there was a determination of competency. Preliminary Hearing was rescheduled for 1/22/02.

5. December 10, 2001. Defense Counsel indicated that he may not be able to designate experts until 3-15-02. The court ordered that the parties make an initial designation of expert witnesses by 4-15-02 and designate additional expert witnesses by 5-6-02. Elapsed time from paragraph 4 above (11-28-01 to 12-10-01) 12 days.

6. January 15, 2002. Defense Counsel informed the Court that the competency evaluation would not be ready by January 22, 2002 (which was the Preliminary Hearing date). January 22, 2002 was selected as the time to reschedule the competency hearing and Preliminary Hearing. Elapsed time from paragraph 5 above (12-10-01 to 1-15-02) 36 days.

7. January 22, 2002. The competency evaluation had not been completed. The competency hearing was therefore continued to April 4th and 5th, 2002 with the Preliminary Hearing to follow. Elapsed time from paragraph 6 above (1-15-02 to 1-22-02) 7 days.

8. February 13, 2002. Counsel for Petitioner informed the Court that the competency issue would be submitted based upon the written evaluations and that no witness would be called on the issue of competency. Elapsed time from paragraph 7 above (1-22-02 to 2-13-2002) 22 days.

9. March 8, 2002. Upon review of the competency evaluations the Court made an initial finding that the Petitioner was competent to proceed. This finding was subject to the Court receiving and reviewing the curricular vitae of the examiners. The competency issue was continued until April 4, 2002. Elapsed time from paragraph 8 above (2-13-02 to 3-8-02) 23 days.

10. April 4, 2002. After reviewing the curriculum vitae of each examiner and the competency evaluation, the Court made a final finding the Petitioner competent. The Preliminary Hearing was held. Probable Cause was found and the matter was bound over. Elapsed time from paragraph 9 above (3-8-02 to 4-4-02) 27 days.

11. April 12, 2002. Petitioner filed a Motion to Retain Dan Jones and Associates to conduct a survey regarding the likelihood of seating a fair and impartial jury in Uintah County. Elapsed time from paragraph 10 above (4-4-02 to 4-12-02) 8 days.

12. April 26, 2002. The State filed its Opposition to the Motion to Retain Dan Jones and Associates. Elapsed time from paragraph 11 above (4-12-02 to 4-26-02) 14 days.

13. April 29, 2002. In a telephone conference, the Court set oral arguments on the Motion to Retain Dan Jones and Associates for June 7, 2002. Elapsed time from paragraph 12 above (4-26-02 to 4-29-02) 3 days.

14. May 13, 2002. Petitioner filed Multiple Motions which the Court was required to rule upon prior to trial. These Motions included; (1) Motion to Quash the Bindover; (2) Motion to Exclude Victim Impact Evidence; (3) Motion to Strike the Death Penalty; (4) Motion Regarding Death Qualification of the Jury; (5) Motion to Bifurcate Count Six; (6) Motion to Exclude Photographs; (7) Motion to Exclude Bad Acts; (8) Motion for Jury View of the Shooting Scene; and (9) Motion to View Shooting Scene, Uintah County Jail and Utah State Prison. Prior to this time the Court had designated July 8, 2002 as the date for oral argument on pending motions. Elapsed time from paragraph 13 above (4-29-02 to 5-13-02) 14 days.

15. May 15, 2002. Petitioner filed two Motions: (1) Motion to Suppress Defendant's statement to Police and (2) Motion for Change of Venue. The Court had previously designated July 8, 2002 as the time for oral argument on pending Motions. Elapsed time from paragraph 14 above (5-13-02 to 5-15-02) 2 days.

16. June 7, 2002. The Court heard oral argument on the Motion to Retain Dan Jones

to Conduct a Poll. The Motion was granted. Defense Counsel requested that the Motion for Change of Venue not be considered on July 8, 2002. Defense Counsel requested that the hearing on the Motion be conducted after the poll was concluded and the issue briefed. The Motion for Change of Venue was scheduled for hearing on August 19, 2002. Elapsed time from paragraph 15 above (5-15-02 to 6-7-02).23 days.

17. June 20, 2002. The United States Supreme Court published its opinion in Atkins v. Virginia, 536 U.S. 304, holding that certain "retarded" defendants are not subject to the death penalty under the Eight amendment. The Supreme Court stated that "'mild" mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70."

18. July 8, 2002. The Court heard oral argument on all pending motions. However, Defense Counsel indicated that he was awaiting review of exhibits on two pending motions (#6 and #7) and was not then able to designate which exhibits he objected to. The Court took these motions under advisement. The Court ruled upon remaining motions, except the Motion to Suppress, which was taken under advisement, and the Motion for Change of Venue which had previously been re-set for hearing on August 19, 2002. Elapsed time from paragraph 16 above (6-7-02 to 7-8-02) 31 days.

19. August 19, 2002. This hearing had been scheduled to hear evidence on the Defendant's Motion for Change of Venue. At the hearing, the parties stipulated to a change of venue. Defense Counsel made a Motion to Vacate the September 20, 2002 trial date. The Court granted this Motion. Although the parties had stipulated to a change of venue, they had not agreed where the trial would be held. The parties also stipulated that the Court rule on the pending Motion to Suppress. Defense Counsel noted that there was a bill pending in a special session of the legislature to address the issues raised in Atkins. Defense Counsel asked the Court to not schedule the trial until after the legislation was passed (which did not occur until the regular session which began in January, 2003). Defendant Counsel also raised the possibility of a hearing regarding mental retardation and an interlocutory appeal. Defendant specifically waived his right to a speedy trial. Elapsed time from paragraph 18 above (7-8-02 to 8-19-02) 42 days.

20. August 20, 2002. In a telephone conference (which was not on the record) the Court informed the parties that the Administrative Office of the Court had notified the Court that, if the case was transferred to the 4th District, it could not be scheduled for trial until March of 2003. Defense Counsel indicated that he had no objections to a March trial and stipulated to transferring the case to Heber. Elapsed time from paragraph 19 above (8-19-02 to 8-20-02) 1 day.

21. September 19, 2002. (Sometime prior to this date the parties had indicated that they had reached a plea agreement which would resolve the case without trial). The parties indicated that because there was no longer an issue of seating an impartial jury, Defendant would withdraw his Motion to Change Venue. Defendant withdrew his Motion to Change

Venue and his Motion to Suppress; and entered into a plea which resolved all charges before the Court. Elapsed time from paragraph 20 above (8-20-02 to 9-19-02) 30 days.

22. The total time between the date Notice was filed (7-20-02) and the date of the plea was 426 days:

| <u>Paragraph</u> | <u>Elapsed Days</u> |
|------------------|---------------------|
| 1 | 0 |
| 2 | 26 |
| 3 | 27 |
| 4 | 78 |
| 5 | 12 |
| 6 | 36 |
| 7 | 7 |
| 8 | 22 |
| 9 | 23 |
| 10 | 27 |
| 11 | 8 |
| 12 | 14 |
| 13 | 3 |
| 14 | 14 |
| 15 | 2 |
| 16 | 23 |
| 17 | 0 |
| 18 | 31 |
| 19 | 42 |
| 20 | 1 |
| 21 | 30 |
| | <hr/> |
| | 426 |

Several periods of time are tolled pursuant to the operation of subsection (4) of the statute as delays which were attributable to Petitioner:

(1) Mr. Wood engaged in conduct while incarcerated after his arrest which raised issues as to whether he was competent to proceed. Counsel for Petitioner made a Motion for a

competency evaluation on November 28, 2001. The State stipulated to an evaluation and the Court ordered an evaluation. On April 4, 2002 the Court found that Petitioner was competent. After the parties stipulated to an evaluation, no hearings could be held until after a finding of competency. The court finds that the delay associated with the determination of competency was for "good cause" under 77-29-1(4). Therefore, the period between November 28, 2001 and April 4, 2002 (127 days) will not be included for the purpose of computing the 120 day period.

(2) On April 12, 2002, Counsel for Petitioner filed a Motion to Retain Dan Jones and Associates to conduct a survey concerning whether an unbiased jury could be seated in Uintah County. This Motion was filed to allow the Defendant to develop evidence in support of his Motion to Change Venue. This Motion was granted at a hearing which was held on June 7, 2002. This delay of 56 days (April 12, 2002 to June 7, 2002) was attributable to the Defendant. The Court finds this delay to be for "good cause" under 77-29-1(4). This period of time will not be considered in computing the 120 day period.

(3) On May 13, 2002 the Petitioner filed various motions which required a ruling by the Court prior to trial. Most of these motions were ruled upon at the July 8, 2002 hearing. However, the Petitioner asked the Court for additional time to designate certain evidence which he sought to exclude from the jury (Motions #6 and #7). The Petitioner never designated the evidence which he sought to exclude; so these motions were still pending when the plea was entered on September 19, 2002. The delay between May 13, 2002 and September 19, 2002 (129 days) was therefore caused by the filing of the various motions listed in paragraph 14 above. The delay was for "good cause" under 77-29-1(4). This period of time will not be included in computing the 120 day period.

(4) On May 15, 2002, the Petitioner filed a Motion to Suppress Defendant's Statements to Police. Oral argument on this motion was presented on July 8, 2002 and the Court took the issue under advisement. The Court had prepared a written Ruling on this Motion but the Petitioner withdrew the Motion at his plea hearing on September 19, 2002 prior to the Court entering its Ruling. The delay between May 15, 2002 and September 19, 2002 (127 days) was therefore caused by the filing of the Motion to Suppress. This was a delay for "good cause" under 77-29-1(4). This period of time will not be included in computing the 120 day period.

(5) On May 15, 2002 the Petitioner filed his Motion for Change of Venue. This issue was set for an evidentiary hearing on August 19, 2002. At that hearing the parties stipulated that the motion should be granted. Defense Counsel made a Motion to Vacate the September 20, 2002 trial date. The delay between May 15, 2002 and August 19, 2002 (96 days) was caused by the filing of the Motion to Change Venue. The delay was for "good cause" under 77-29-1(4). This period of time will not be included in computing the 120 day period.

With respect to the 426 days between the date that the Notice was filed (7-20-01) and the date the plea was entered (9-19-02) the Court has found good cause under 77-29-1(4) for

all periods of time except:

1. From the date the Notice was filed (7/20/01) to the date the parties agreed upon a Preliminary Hearing date (8/15/01) - 26 days.

2. From the date the parties agreed upon a Preliminary Hearing date (8/15/01) to the date defense counsel was appointed (9/11/01) - 27 days.

3. From the date defense counsel was appointed (9/11/01) to the date the Petitioner filed his Motion for a Competency evaluation (11/28/01) - 78 days .

4. From the date that the Preliminary Hearing was held (4/4/02) to the date the Petitioner filed his Motion for a Survey regarding jury bias (4/12/02) - 8 days.

| | |
|----------------|------------------|
| 5. Total time: | 1) 26 days |
| | 2) 27 days |
| | 3) 78 days |
| | <u>4) 8 days</u> |
| | 139 days |

On August 15, 2001 the parties stipulated that the Preliminary Hearing should be held on December 10, 2002. On November 28, 2001 the Petitioner requested a competency evaluation which tolled the running of the 120 day period. There are 105 days (8-15-01 to 11-28-01) which may be tolled based on subsection (3) (which excludes certain continuances). The record does not reflect the factors which caused counsel to agree upon the December 10 Preliminary Hearing date. Because no notice under the unlawful detainer statute had been provided to the Court or counsel for the State; there was no reason to make a record concerning this issue or to obtain a ruling as to whether some or all of this period of time should be excluded under subsection (3). Although the State may claim that some or all of this time period should be excluded under subsection (3), for the purpose of this Motion the Court will include the period from 8-15-01 to 11-28-01 in computing the 120 day period. One hundred and thirty one (131) of the 139 days occurred from the time of the filing of the Notice (7-20-02) to the time the Motion for a Competency hearing was filed (11/28/01). Defense counsel was not even "tentatively" appointed until 8/15/01. If the Court merely excluded the time prior to the "tentative" appointment of counsel (7/20/01 to 8/15/01) 26 days would be excluded. This would reduce the time below the 120 day threshold.

Nevertheless, even assuming that the 120 day period has ran, the statute (77-29-1 (4)) requires the Court to examine the record to see whether there was "good cause" for the prosecutors failure to bring the matter to trial within 120 days. As will be more fully discussed below, even assuming that 139 days had elapsed, there was "good cause" under 77-29-1 (4) for failing to bring this matter to trial within 120 days.

In determining whether "good cause" exists under subsection (4) the Court must "review the proceeding" and determine whether the failure to bring the matter to trial within 120 days is "supported by good cause". In this case, the following facts are relevant to the issue of good cause under subsection (4):

1. Neither the State nor the Court was aware that a 120 day Notice had been filed. It is clear that the 120 day period begins to run when the Notice is filed. For purpose of computing the 120 day period it is therefore not relevant that the State and the Court had not been informed of the filing of the Notice. Nevertheless, in considering whether there was "good cause" for the prosecutor's failure to bring the matter to trial within 120 days it is certainly relevant that the prosecutor was not aware of the filing of the Notice. Without notice, neither the prosecutor nor the Court was provided with a motive to provide a trial date within 120 days.

2. Delay in the Appointment of Defense Counsel. As indicated, 426 days elapsed between the filing of the Notice (7-20-10) and the plea (9-19-02). Two hundred eighty seven (287) of the 426 days have been tolled based on delays attributable to the Petitioner. Therefore, 139 days elapsed prior to the plea. Twenty six of those days elapsed prior to the time that counsel was tentatively appointed (7-20-01 to 8-15-01). Another 27 days elapsed prior to the time counsel was formally appointed (8-15-01 to 9-11-01). Even assuming that counsel was fully functioning when "tentatively" appointed on 8/15/01, 26 days were lost while counsel was selected and appointed. The procedural process required for appointment of attorneys in capital cases is unique in criminal law. (See Rule 8 U.R.Cr.P.). Two attorneys must be appointed. Each must be qualified under the Rule to represent capital defendants. The Trial Court is required to review the attorney's qualification to ensure that they each meet Rule 8 requirements. As in this case, capital offenses are often not included in the contracts of local legal defenders. (Local public defenders were not qualified to represent capital defendants under Rule 8). This necessitates a certain amount of time to solicit and award contracts with Rule 8 qualified counsel. As stated, even after a contract is entered into, the Court must review counsel's qualifications. This takes additional time. For purposes of this analysis 26 days was not an unreasonable period of time to solicit, appoint, and approve counsel. No substantive issue could be resolved prior to the appointment of an attorney. The prosecutor was entirely unable to move the case forward during this 26 day period; and if the twenty-six days are not considered, the matter was concluded within 120 days.

3. Capital cases require thorough investigation and preparation. A review of the Motions filed in this case is instructive as to the complicated issues which are typical of capital cases (see paragraphs 4, 11, 14, 15 ((pages 4-6)) above). While it may be possible to go through all of the proceedings necessary to bring a matter to trial within 120 days in most cases, One hundred and twenty days would not be adequate in many (if not most) capital cases. One hundred and twenty days is simply not enough time for counsel to investigate and properly prepare capital cases. On page three of Petitioner's Memorandum Mr. Wood reports

that when he requested counsel to file a Motion to Dismiss, Mr. Bugden "...said that they could not do Petitioner's case in 120 days..." This is a clear indication that Petitioner's counsel did not believe he could adequately prepare the case within 120 days. (Indeed, given the issues in this case and the opinion of Mr. Bugden, Mr. Bugden would have provided ineffective assistance of counsel if he would have attempted to try the case before he was able to provide a full defense on all issues).

Based upon the facts and circumstances in this case the Court concludes that, even assuming the Petitioner's alleged facts, there was "good cause" under subsection (4) for the failure of the prosecutor to bring this matter to trial within 120 days.

It is, therefore, clear that counsel was not ineffective in failing to file the Motion to Dismiss. Given Mr. Bugden's professional opinion that he could not prepare the case for trial within 120 days; it is clearly within the wide range of discretion allowed trial counsel in determining trial tactics to refuse to file a motion which would fail. In addition, by filing the motion, counsel would have introduced the 120 day issue into scheduling decision, which may have forced the trial to be scheduled prior to the time counsel was prepared to defend the Petitioner's life. Finally, because there was "good cause" for failing to bring the matter to trial within 120, the Petitioner was not prejudiced by counsel's failure to file the Motion.

IV: Speedy Trial - (Constitution)

Although the Amended Petition claims the Petitioner's Constitutional Rights to a Speedy Trial were violated. The Petitioner does not allege any facts, analysis, or argument under the constitutional right to a speedy trial (Amendment VI of the United States Constitution). Nor does the Petitioner raise any facts, analysis, or argument pursuant to UTAH CODE ANN. § 77-1-6(f), which guarantees the right to a speedy trial afforded by the Utah Constitution. Instead, the Petitioner bases his claim upon UTAH CODE ANN. § 77-29-1 et. seq. In addition, on August 19, 2002 the Defendant specifically waived his right to a speedy trial. The Motion is therefore granted as to the issue of whether the Petitioner was denied a speedy trial under the State and/or Federal Constitutions.

The Respondent's Motion to Dismiss is granted.

DATED this 9 day of February, 2005.

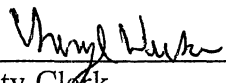
BY THE COURT:



A. LYNN PAYNE, DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that on the 9th day of February, 2005, true and correct copies of the Ruling were mailed, postage prepaid, to: Lee Roy Wood, #18439, Petitioner, at c/o Central Utah Correctional Facility, P.O. Box 550, Gunnison, UT 84634 and to: Erin Riley, Assistant Utah Attorney General, at 160 E. 300 S., 6th Floor, P.O. Box 140854, Salt Lake City, UT 84114-0854.



Deputy Clerk

Addendum B

U.C.A. 1953 § 77-29-1

C

West's Utah Code Annotated Currentness

Title 77. Utah Code of Criminal Procedure

Chapter 29. Disposition of Detainers Against Prisoners

→§ 77-29-1. Prisoner's demand for disposition of pending charge--Duties of custodial officer--Continuance may be granted--Dismissal of charge for failure to bring to trial

(1) Whenever a prisoner is serving a term of imprisonment in the state prison, jail or other penal or correctional institution of this state, and there is pending against the prisoner in this state any untried indictment or information, and the prisoner shall deliver to the warden, sheriff or custodial officer in authority, or any appropriate agent of the same, a written demand specifying the nature of the charge and the court wherein it is pending and requesting disposition of the pending charge, he shall be entitled to have the charge brought to trial within 120 days of the date of delivery of written notice.

(2) Any warden, sheriff or custodial officer, upon receipt of the demand described in Subsection (1), shall immediately cause the demand to be forwarded by personal delivery or certified mail, return receipt requested, to the appropriate prosecuting attorney and court clerk. The warden, sheriff or custodial officer shall, upon request of the prosecuting attorney so notified, provide the attorney with such information concerning the term of commitment of the demanding prisoner as shall be requested.

(3) After written demand is delivered as required in Subsection (1), the prosecuting attorney or the defendant or his counsel, for good cause shown in open court, with the prisoner or his counsel being present, may be granted any reasonable continuance.

(4) In the event the charge is not brought to trial within 120 days, or within such continuance as has been granted, and defendant or his counsel moves to dismiss the action, the court shall review the proceeding. If the court finds that the failure of the prosecuting attorney to have the matter heard within the time required is not supported by good cause, whether a previous motion for continuance was made or not, the court shall order the matter dismissed with prejudice.

Laws 1980, c. 15, § 2.

Jurisdiction Laws Effective Statutory Citation

Date

U.C.A. 1953 § 77-29-1

Alabama 1978, No. 590 4-27-1978 Code 1975, §§ 15-9-80 to 15-9-88.
Arizona 17 A.R.S. Rules of Crim.Proc., rule
8.3(b).
Colorado 1969, p. 291 10-1-1969 West's C.R.S.A. §§ 16-14-101 to
16-14-108.
Kansas 1970, c. 129 7-1-1970 K.S.A. 22-4301 to 22-4308.
Minnesota 1967, c. 294 5-4-1967 M.S.A. § 629.292.
Missouri 1959, H.B. 7-1-1971 V.A.M.S. §§ 217.450 to 217.485.
259
North Dakota .. 1971, c. 321 NDCC 29-33-01 to 29-33-08.
Utah 1980, c. 15 7-1-1980 U.C.A.1953, §§ 77-29-1 to 77-29-4.

HISTORICAL AND STATUTORY NOTES

Uniform Law

This section is similar to §§ 1 and 2 of the Uniform Mandatory Disposition of Detainers Act. See Volume 11A Uniform Laws Annotated, Master Edition, or ULA Database on Westlaw.

U.C.A. 1953 § 77-29-1, UT ST § 77-29-1

Current through end of 2005 First Special Session

© 2005 Thomson/West

END OF DOCUMENT