

2005

West Valley City v. Stanley Fieeiki : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WEST VALLEY CITY,

PLAINTIFF/APPELLEE,

v.

STANLEY FIEEIKI,

DEFENDANT/APPELLEE.

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Case No. 20050459-CA

Not Incarcerated

REPLY BRIEF OF APPELLANT

This is an appeal from a conviction for simple assault, a class B misdemeanor, entered in the Third District Court in and for Salt Lake County, West Valley Department, State of Utah, the Honorable Terry Christiansen, Judge, presiding.

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ARGUMENTS

I.

THE CITY’S BRIEF CONTAINS
SIGNIFICANT FACTUAL INACCURACIES.

In its Statement of Facts, the City indicates that “At the hearing, the parties stipulated that there was no negotiation between Mr. Brass and Mr. Torriente (R. 328: 52). While Fieeiki maintains that the prosecutor who was controlling the plea negotiations in his case was John Huber (Hearing Exhibit 1; R. 328: 5-7), there was no stipulation that there was no negotiation between Mr. Brass and Mr. Torriente. Page 52 of R. 328 reflects the parties stipulating that there were no plea negotiations between Brass and Torriente prior to the interview, and agreeing with the court that the transcript of the interview between Torriente, Nudd and Fieeiki, would speak for itself. This page of the transcript is in the addendum to this brief.

The City argues that

Mr. Brass conceded that it was not impossible that a plea in abeyance was not offered prior to the September 9th interview and that the interview may have been conducted in an effort to assist the prosecution in making an appropriate charging decision or not making one at all (R. 328: 15-16).

City's brief at 9.

Reading Brass's testimony at R. 328: 15-16 confirms that while Brass conceded the possibility that his recall was incorrect, Brass's recollection was that he took Fieeiki to the interview with Nudd and Torriente in an effort to improve upon Huber's offer of a plea in abeyance, and that Fieeiki's statements to Nudd and Torriente were made in pursuit of the plea bargain. The transcripts pages including all of Brass's testimony are in the addendum to this brief.

The City's last factual assertion in its Statement of Facts, is that "Fieeiki testified his expectation at the meeting was to tell the prosecutors what happened. (R. 328: 68)." By reviewing that transcript page, in the addendum to this brief, the Court can readily confirm that Fieeiki went to the interview with the intent to

tell them what happened and to get this matter resolved by a dismissal, not by – not accepting a plea in abeyance. Hopefully maybe something other than a plea in abeyance. But that was all that was on the table at that time.

(R. 328: 68).

In its Argument, the City asserts that Brass stated that his understanding of the purpose of the meeting between Fieeiki and Nudd and Torriente was for Fieeiki "to be able to present his side of the story." City's brief at 16. By reviewing Brass's affidavit and testimony, which are in the addendum to this brief, this Court can confirm that

Brass's testimony and affidavit both establish that Fieeiki's purpose in going to the interview was to settle the case.

In writing its opinion in this case, this Court should not rely on the foregoing factual inaccuracies in the City's brief.

II.
THE TRIAL COURT'S RULINGS
WERE CLEARLY ERRONEOUS.

The City discusses the marshaling requirement in its Statement of the Issues, City's brief at 2, and argues in its Summary of the Argument that this Court should *conclude that the trial court's finding that Fieeiki's statements to Nudd and Torriente* were part of the investigation rather than made in pursuit of a plea bargain is "not clearly erroneous and is amply supported by the record." City's brief at 11.

However, the City never addresses or refutes Fieeiki's marshaling of the evidence or detailed arguments that the trial court's rulings contained numerous clearly erroneous factual findings, which render it unreliable and require reversal. Compare Fieeiki's opening brief at 12-19 with City's brief at 1-21.

Fieeiki stands by his marshaling of the evidence and unrefuted arguments challenging the trial court's clearly erroneous and outcome-determinative factual findings. See Fieeiki's opening brief at 12-19.

III.
THE TRIAL COURT'S RULINGS
WERE LEGALLY INCORRECT.

In response to Fieeiki's argument that the trial court was legally in error in ruling that Brass should have expressly noted that the Nudd-Torriente-Fieeiki interview was privileged as part of the negotiation process, Fieeiki's opening brief at 20-22, the City cites People v. Taylor, 682 N.E.2d 310, 313014 (Ill. App. 4th Dist. 1997).

Taylor, a state court decision, obviously does not control over the Supreme Court's decision in United States v. Mezzanatto, 513 U.S. 196 (1995), which recognizes a criminal defendant's right not to be impeached with plea negotiation statements under Federal Rule of Evidence 410, and that the right not to be impeached is a right which must be expressly waived. Given the persuasive nature of authority under the federal rule which is the Utah Rule verbatim, Mezzanatto establishes the error of Fieeiki's judge's ruling that his right was waived silently, by his lawyer's failure to assert it. See id at 207-09.

Taylor does not control this case, because it does not apply rules identical to Utah Rules of Evidence 408¹ or 410,² but was instead applying Illinois Supreme Court Rule

¹Rule 408 provides:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another

402(f), which provided:

“If a plea discussion does not result in a plea of guilty, or if a plea of guilty is not accepted or is withdrawn, or if judgment on a plea of guilty is reversed on direct or collateral review, neither the plea discussion nor any resulting agreement, plea, or judgment shall be admissible against the defendant in any criminal proceeding.”

Taylor, 468 N.E.2d at 312.

Taylor is factually disparate from the instant case, because Taylor did not have a lawyer who arranged his police interview through a prosecutor in an effort to settle the

purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

²Rule 410 provides:

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

- (1) a plea of guilty which was later withdrawn;
- (2) a plea of nolo contendere;
- (3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or
- (4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

case, as Fieeiki did. Rather, to facilitate the execution of a search warrant, Taylor was required to open a church where he worked, and was then brought to the police station by the police for an interview, which began with a Miranda warning, lasted an hour and forty-five minutes, involved no defense lawyer or prosecutor. It was shortly following this interview that Taylor was arrested. Id. at 311-312. Taylor worked as an “auxiliary police officer,” and knew the officers who interrogated him, and in the course of the interrogation, Taylor mentioned his prior no contest plea to a traffic offense, and inquired what would happen if he pled no contest to the sexual assault complaint the officers were investigating. The officers told them they did not know, as they had no control over it. Id. at 312. In rejecting Taylor’s claim that his no contest plea inquiry should be excluded under Rule 402(f), *supra*, the court applied essentially the same test Fieeiki asserts on page 28 of his opening brief and the City discusses on pages 13 and 14 of its brief – by assessing whether Taylor had a subjective belief that he was negotiating a plea, and then by assessing whether that belief was objectively reasonable given the totality of the circumstances. Taylor at 312.³

In applying the test, the Taylor court noted that there were no lawyers involved, but that Taylor was talking with his fellow officers, relaying an anecdote about his prior

³The City’s brief notes that some courts feel that the test relied on by Fieeiki should be supplanted with a “totality of the circumstances” test. City’s brief at 14 and n.4. However, given that the second prong of Fieeiki’s test considers all facts, and that his subjective expectations would seem to be part of the “totality of the circumstances,” it does not appear that the new test applied by some federal courts is materially different from the one Fieeiki applies.

traffic case, and merely inquiring about his fellow officers' opinions about a no-contest resolution in the sexual assault case, rather than actually offering to plead no contest.

Taylor at 313-314.

In contrast here, the entire interview was arranged by Fieeiki's lawyer and the prosecutor in an effort to resolve the criminal case, and the record demonstrates Fieeiki's objectively reasonable subjective belief that the purpose of the interview was to settle his case, rather than to aid the police in their investigation. See, e.g., Fieeiki's opening brief at 28.

The City's reliance on United States v. Penta, 889 F.2d 815 (1st Cir.), cert. denied, 498 U.S. 896 (1990), is similarly misplaced, because in Penta, there was no interview arranged between prosecuting and defense attorneys in the course of case settlement efforts as there was here. Instead, Penta attended numerous interviews with a prosecuting attorney and investigator who were working to build a case against Penta's associates. Penta feared that the prosecutor would charge him as well, and in the course of cooperating with the prosecutor repeatedly asked what was going to happen to him. Id. at 816-17. While it appeared that Penta was trying to obtain lenience from the prosecutor, he never directly asked for it, and the prosecutor never offered it. Id. In contrast here, Fieeiki hired a lawyer, who approached the prosecutor and arranged for the interview in the course of settling the case.

The City's other case, People v. Jones, 734 N.E.2d 207, 213 (Ill. App.3d 2000),

overruled on other grounds, 757 N.E.2d 464 (Ill. 2001), is likewise inapposite, because it involved a defendant without a lawyer who repeatedly spoke with the police, who repeatedly told him they were not in a position to make a deal. The defendant did not believe that his statements were part of a plea agreement or a preliminary step to a plea agreement. See Jones, 734 N.E.2d at 213. In contrast here, Fieeiki reasonably believed that his statements made to the police under his lawyer's instructions and with his lawyer present, were made in the course of his lawyer's efforts to settle the case. Accordingly, his statements should have been excluded under both Utah Rules of Evidence 408 and 410, *supra*. See Fieeiki's opening brief at 22-29.

The City argues that the Fieeiki interview is properly viewed as investigative, rather than as a settlement negotiation, because there was no evidence of Fieeiki's offering to enter any specific plea, and no evidence of a *quid pro quo*. City's brief at 14-16.

Particularly given that Nudd and Torriente were acting as Huber's agents in the course of Huber's settlement negotiations with Brass, and that Huber was the prosecutor with the power to specify the ultimate terms of the settlement, there was no reason for Brass or Fieeiki to try and specify the exact terms of the settlement in the course of the interview with Nudd and Torriente. See Fieeiki's opening brief at 25-26.

Brass was trying to settle the case on behalf of Fieeiki with a resolution better than the plea in abeyance that would cause Fieeiki to lose his job as a peace officer. Defense

lawyers in plea negotiations often seek the best resolutions for their clients – pleas in abeyance, diversions, or dismissals. The fact that Fieeiki’s lawyer was seeking such a favorable resolution of his case does not make the negotiations any less settlement negotiations, or any more an effort to aid in the investigation and prosecution of Fieeiki.

Assuming *arguendo* that Fieeiki must point to something he was trying to give in the spirit of *quid pro quo*, his continuing desire and willingness to serve as an excellent peace officer in our community should be recognized as such (R. 325: 148-53, 160-61, 165).

The City claims that Fieeiki never demonstrated a subjective belief that his statements were made for purposes of settlement, other than presenting “self-serving” statements at the hearing on the motion to suppress. City’s brief at 19. Fieeiki had a constitutional right to testify on his own behalf, see Constitution of Utah, Article I §§ 7 and 12; Christiansen v. Harris, 163 P.2d 314, 317 (Utah 1945), and the fact that his testimony aided his case does not diminish the credibility of his testimony. Fieeiki’s testimony is not the only evidence of his subjective intent. His lawyer, Ed Brass, also repeatedly testified that Fieeiki’s intent in attending and participating in the interview with Nudd and Torriente was to secure the favorable resolution of his case (e.g. R. 328: 5, 25-26).

The City’s observation that Fieeiki was not charged, e.g., City’s brief at 19, should not weigh heavily in the analysis, given that Fieeiki had already been arrested and

removed from his home at the time that he went with his lawyer to talk with a prosecutor and police officer in the course of settling his case (R. 352: 101, 177).

Because it is nonsensical and contradicted by the record, this Court should reject the City's and trial court's theory, that Fieeiki, an experienced police officer, and his experienced criminal defense attorney, Ed Brass, who were both fighting to save Fieeiki's job so he could continue to support his family of eight, would walk into the police station with the intent to aid in the investigation and prosecution which would doom Fieeiki's career.

IV. THE ADMISSION OF FIEEIKI'S STATEMENTS WAS REVERSIBLE ERROR.

The City does not refute or address Fieeiki's argument that the admission of his statements to Torriente and Nudd should be viewed as structural error. Compare Fieeiki's opening brief at 29-30 with City's brief at 1-21. Fieeiki stands by that unrefuted argument.

The City contends that the error in this case was harmless, because there were multiple witnesses to Fusina Fieeiki's physical injuries. City's brief at 20.

The mere fact that Fusina was injured does not establish that Fieeiki was the cause of the injuries, or that he intentionally, knowingly or even recklessly inflicted them.

The jurors, who convicted Fieeiki of the lesser included class B misdemeanor assault (R. 197), which was erroneously defined in the exact same terms as the class A

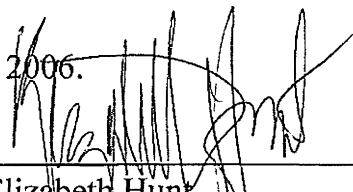
misdemeanor assault (R. 212, 217), were clearly sympathetic to Fieeiki. The jurors, who heard the testimony regarding the exhausting “Hell Week” Fieeiki was recovering from when his wife attacked him as he was sleeping, see Fieeiki’s opening brief at 3-5, may well have concluded that he was not the cause of the injuries, or that he was not acting with the requisite intent, or that the prosecution did not disprove self defense beyond a reasonable doubt, as the elements instruction required (R. 212). The admission of Fieeiki’s statements made in the course of his efforts to compromise the case in a plea bargain effectively forced Fieeiki to testify, and shaped the entire trial, transforming a questionable case into a “slam dunk” for the prosecution (R. 328: 40).

A new trial is thus in order.

CONCLUSION

This Court should order a new trial wherein Mr. Fieeiki’s statements to Torriente and Nudd are properly excluded.


Respectfully submitted this July 31, 2006.



Elizabeth Hunt
Counsel for Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing, first class postage pre-paid to the West Valley City Attorney, 3575 South Market Street, 2nd Floor, West Valley City, Utah 84119, this July 31, 2006.

A handwritten signature in black ink, featuring a series of vertical strokes and a final flourish, positioned above a horizontal line.

ADDENDUM

R. 328: 52

STIPULATION OF THE PARTIES

1 in five minutes.

2 THE COURT: It's up to you.

3 MR. ROBINSON: Let's just call the
4 witness. Sean Torriente will be my next witness.

5 THE COURT: Okay. Bring him in. Wait a
6 minute. Let's make sure we are on the record.

7 MR. ROBINSON: You did not engage in plea
8 negotiations with Mr. Brass other than what you may
9 see on the record in the transcript?

10 MR. DRAKE: I think the stipulation is,
11 prior to the taped interview, there were no
12 negotiations between Mr. Torriente and Mr. Brass.

13 THE WITNESS: Yes.

14 THE COURT: The transcript speaks for
15 itself as to what occurred.

16 MR. DRAKE: And the transcript speaks for
17 itself.

18 THE COURT: I'll accept that statement.

19 MR. DRAKE: And also, I guess he's going
20 to call Detective Nudd, or Mr. Nudd. But I think on
21 that situation the transcript speaks for itself as to
22 what he would testify to.

23 THE COURT: Is there anything else that --

24 MR. ROBINSON: Yes, I do. I plan on
25 inquiring about their conversation pretranscript

TESTIMONY OF ED BRASS

1 the defense, being first sworn, was examined and
2 testified as follows:

3 DIRECT EXAMINATION

4 BY MR. DRAKE:

5 Q. Would you please state your name for the
6 record.

7 A. It's Ed Brass. B-R-A-S-S.

8 Q. And what is your occupation?

9 A. Lawyer.

10 Q. Did you represent one Stanley Fieeiki on
11 -- prior to the 9th day of September 2003?

12 A. I did.

13 Q. And in what capacity were you retained by
14 him?

15 A. His lawyer. I acted as his lawyer in a
16 pending criminal prosecution.

17 Q. And you have heard today that a
18 prosecution was pending against Mr. Fieeiki?

19 A. I understood that an investigation had
20 been conducted, and that it was being considered for
21 charges by the West Valley City Attorney's office
22 when I became involved.

23 Q. And did you then contact anybody at the
24 West Valley City Prosecutor's office about this case?

25 A. I had several conversations before and

1 after charges were filed with John Huber, who was
2 then the West Valley City Prosecutor.

3 Q. And that was prior to the charges being
4 filed?

5 A. Both before and after.

6 Q. Now, did the West Valley City Prosecutor's
7 office or Mr. Huber give you any type of a plea in
8 the event charges would be filed?

9 A. Yes. At some point in time, Mr. Huber
10 proposed that this case could be resolved with a plea
11 in abeyance.

12 There were also other discussions that
13 preceded that about whether charges should be filed
14 at all. Our hope, from the outset of the case, was
15 that perhaps this case wouldn't be charged.

16 Q. But if it were, then a plea in abeyance
17 would be offered?

18 A. Right. And again, remember, these were a
19 number of different conversations. I couldn't tell
20 you when they took place, but the very first
21 conversations would have dealt with not charging at
22 all. The next conversations would have been about,
23 all right, if it's charged, then it will be a plea in
24 abeyance.

25 Q. And did those conversations occur prior to

1 the September 9th date?

2 A. My recollection is that they did.

3 Q. Was a meeting then ever arranged between
4 Mr. Huber's office and the defendant and you?

5 A. Yes.

6 Q. And that was the meeting set for September
7 the 9th, 2003?

8 A. The date escapes me, but I'll take your
9 word for it that that was the date.

10 Q. According to the taped transcript, it does
11 say --

12 A. I have no reason to take issue with that.
13 I just don't have a specific recollection of it.

14 Q. I understand. Now, what was the purpose
15 of that meeting?

16 A. The purpose of the meeting was for Mr.
17 Fieeiki -- as I understood it, before we arrived, for
18 Mr. Fieeiki to be able to present his side of the
19 story, and so that the prosecutor's office could make
20 a decision about what they were going to do with the
21 case in terms of charging, and so that he could
22 improve on the offer of a plea in abeyance.

23 Q. So would you characterize this as
24 settlement negotiations?

25 A. That would be the only purpose in my mind

1 for making such a statement.

2 Q. In fact --

3 MR. DRAKE: Your Honor, if I may approach
4 your clerk. I have an Exhibit 1.

5 MR. ROBINSON: I would wonder if we could
6 propose to introduce the entire original transcript.
7 Then you could then point out --

8 THE COURT: It's already been submitted to
9 the Court.

10 MR. ROBINSON: What has been submitted to
11 the Court was a redacted transcript that included the
12 things that we determined by stipulation not to admit
13 to the jury.

14 I think what he is attempting to admit to
15 the Court today are the pages that were not going to
16 be admitted to the jury.

17 MR. BROWN: We don't have an objection to
18 that, your Honor. We are just trying to make it --
19 focusing the Court's attention on the last few pages
20 of the transcript that the Court previously had not
21 received, dealing with some of the discussions, what
22 had happened after that interview.

23 THE COURT: Do you have any objection to
24 the exhibit?

25 MR. ROBINSON: I wasn't certain that, you

1 know, based on the fact you have the rest of the
2 exhibit introduced already in evidence, I don't.

3 THE COURT: All right. I'll admit Exhibit
4 1.

5 (DEFENDANT'S EXHIBIT-1 WAS RECEIVED.)

6 MR. DRAKE: And your Honor, we'd move for
7 the admission of the Defendant's Exhibit 1.

8 THE COURT: I have admitted that.

9 Q. (By Mr. Drake) Now, Mr. Brass, if I could
10 draw your attention to what has been marked on the
11 Exhibit 1 as page 38, and it says:

12 "Nudd --"

13 Well, and then he says:

14 "Well, those are all the things that I'm
15 sure you will be bringing up, and you can
16 talk to Mr. Huber about."

17 And then you --

18 A. That's exactly what I was just telling you
19 about. This is what it says:

20 "I figured you guys would do this. Do you
21 know what the time frame is you guys are
22 working with?"

23 And Mr. Nudd said,

24 "Hopefully I'll have a decision on this
25 rather quick now that we've got a

1 statement."

2 "Okay. I'll write them. Thanks."

3 Q. Going back to Nudd, "Now that we've got a
4 statement," what was the decision that you were
5 anticipating, again?

6 A. One of two things. Again, what the charge
7 would be, if anything. And whether or not an offer
8 would be made that was something other than a plea in
9 abeyance, because that would do Mr. Fieeiki no good.

10 Q. Okay. Now, was there a prosecutor present
11 at this meeting?

12 A. Yes.

13 Q. And do you recall his name?

14 A. Sean Torriente. He is --

15 Q. And --

16 A. -- now with the County Attorney's office.

17 Q. I'm sorry. I didn't mean to interrupt
18 you.

19 A. He now works for the District Attorney's
20 office. He worked for the City Prosecutor's office
21 at the time, is my understanding.

22 Q. And this meeting was held where?

23 A. In his office.

24 Q. And he was present during the whole of the
25 conversation?

1 A. He was present for the whole discussion.

2 Q. Okay.

3 A. In fact, you have the transcript and I
4 don't, but my recollection is that he may have even
5 asked some questions or had been asked at one point
6 did he desire to ask some questions.

7 Q. Now, you had discussions with Mr. Fieeiki
8 prior to going to this meeting?

9 A. Yes.

10 Q. Based upon what was stated by him to you,
11 what would you say that his subjective interpretation
12 of this meeting would have been?

13 MR. ROBINSON: Objection. Speculation.

14 THE COURT: Sustained.

15 Q. (By Mr. Drake) Did Mr. Fieeiki verbalize
16 to you an expectation of what this meeting -- the
17 purpose of this meeting would be?

18 A. He had two goals. The goals were --

19 MR. ROBINSON: Objection to the
20 foundation, I'd like him to testify to what he
21 stated, I think was the question.

22 THE COURT: Yeah. The question,
23 Mr. Brass, is did he state anything to you in terms
24 of what his purpose was.

25 THE WITNESS: Yes.

1 Q. (By Mr. Drake) And what did he state to
2 you?

3 A. He stated that he had two goals with
4 respect to this meeting. The first was to see
5 whether or not he would be charged at all, if he
6 could persuade them not to do that. And the other is
7 to make it clear to them what an impact this would
8 have on his life, even if it was resolved with a plea
9 in abeyance.

10 MR. DRAKE: I have nothing further at this
11 time.

12 THE COURT: Cross?

13 MR. ROBINSON: Yes.

14

15 CROSS-EXAMINATION.

16 BY MR. ROBINSON:

17 Q. One of the items submitted in the motion
18 in limine was a signed affidavit from September 1st
19 of this year?

20 A. Right.

21 Q. Who prepared that affidavit?

22 A. Not me. I don't know who prepared it.

23 Q. You did not write that affidavit?

24 A. No. I had the opportunity to make some
25 alterations to it, and I think I did, but I didn't

1 prepare the original affidavit.

2 Q. Okay. And you signed that affidavit on
3 September 1st of 2004?

4 A. Right.

5 Q. So just under one year after --

6 A. Right.

7 Q. -- most of this discussion had taken
8 place?

9 A. Well, I don't know what you mean by "most
10 of the discussion." I mean, one year -- roughly one
11 year after the meeting took place, there were
12 discussions before and after, like I say, so I don't
13 --

14 Q. Okay. Is it fair to say that your
15 recollection in September of 2004 is no longer
16 complete as to the details of your conversations with
17 Mr. Huber?

18 A. Oh, what it would have been in September
19 of 2003?

20 Q. Yes.

21 A. Absolutely. I mean, I couldn't say that I
22 could repeat verbatim what he said to me in
23 September of 2003 or July or, you know, the time
24 leading up to September, 2003, and the time
25 afterwards. I can give you my best recollection.

1 That's it. I've done a few cases since then.

2 Q. Sure. And you did testify that it was
3 important to Mr. Fieeiki that he -- that you arranged
4 for him this meeting to speak to the West Valley City
5 Attorney's office.

6 A. It was very important to him because his
7 job was in jeopardy.

8 Q. Did he relate to you that some of that had
9 to do with the -- maybe the briefness of the account
10 he gave to the police at the scene?

11 A. You know, that sounds sort of familiar to
12 me, what you are saying. I mean, that seemed to be
13 more in the context of a problem with his employer,
14 which I was not handling, as opposed to the criminal
15 problem. Something to do with some difficulty he
16 might have had with the Highway Patrol.

17 Q. So as you testified, you did contact
18 Mr. Huber at his request?

19 A. Yes.

20 Q. And --

21 A. Pretty early on. I mean, almost as soon
22 as I got the case.

23 Q. And had multiple conversations with him.

24 A. Right.

25 Q. You've indicated one of those purposes

1 that you stated to John was to -- that Mr. Fieeiki
2 wanted to present his side of the story so that -- in
3 the hopes maybe charges wouldn't be filed?

4 A. Right.

5 Q. And I want to address, maybe, in more
6 detail, your recollections of any discussion of a
7 plea in abeyance.

8 A. Right.

9 Q. Is it a possibility that a plea in
10 abeyance was not offered before this interview?

11 A. You know what? I won't say it's
12 impossible, but the reason I remember it that way was
13 because it seemed to me that in the conversation we
14 had that was within days after the interview, after
15 he had had a chance to talk, I assumed, to Mr. Nudd
16 and Mr. Torriente, maybe even reviewed the tape
17 themselves, what I remember about that conversation
18 is he said he's not going to change the offer. The
19 offer is not going to get any better. It is still a
20 plea in abeyance. So it's that recollection that's
21 strongest to me. And from that, you know, I infer
22 that sometime prior to that is when it first came up.

23 Q. Is it possible, based on your recollection
24 of the conversations preceding September 9th, that it
25 was more in the context of, "We'd like information so

1 we can decide what to charge and what to offer"? The
2 decision hadn't been made for sure that a plea in
3 abeyance was on the table?

4 A. The way that you posed the question, I
5 would say that's possible, because you know how it is
6 that we operate in the criminal justice system.
7 There's offers, and there's discussions, and there is
8 "sort of" offers, and preliminary discussions to an
9 offer. There's whole different stages in the
10 negotiation process. So I wouldn't say what you just
11 said was impossible, no.

12 Q. And did you believe it was possible that a
13 plea in abeyance might not be offered if this
14 interview didn't go well?

15 A. I certainly believe any time a person goes
16 in and makes a statement, that there's at some risk
17 that any offer that's been made or discussions about
18 an offer could be withdrawn based on new information
19 coming to light that they didn't previously know.
20 That's always a risk. That's the way I'd have to
21 answer that question.

22 Q. Did you ask Mr. Huber not to file charges
23 until the hearing, until this interview had taken
24 place?

25 A. Yes. I asked Mr. Huber many times not to

1 file charges.

2 Q. But Mr. Huber didn't ever offer a specific
3 plea in exchange for some sort of confession or
4 showing of accountability by Mr. Fieeiki?

5 A. Okay. I'm going to try and state to you
6 the way I understand your question, so I'm clear.
7 Are you saying was there ever a quid pro quo where it
8 was, "You have to come in and say you did this and
9 you are sorry in exchange for a specific offer"? No.
10 That never happened. Absolutely, that never
11 happened.

12 Q. And you believe, but aren't certain, that
13 a plea in abeyance had been --

14 A. Discussed before.

15 Q. -- formally offered?

16 A. Formally offered? I honestly can't answer
17 "formally offered." My impression was that that was
18 an offer that had been made, and he could accept it
19 if he chose to. There's problems with it for a
20 police officer to do so because of the way the Police
21 Officers' Standards and Training treats pleas in
22 abeyance.

23 So it's essentially -- if you are
24 concerned about your job, it's essentially not an
25 offer. I hope that answered your question.

1 Q. So from the very beginning, a plea in
2 abeyance wasn't something he was interested in?

3 MR. DRAKE: Objection, your Honor. It's
4 unclear as to who "he" was interested in.

5 Q. (By Mr. Robinson) It wasn't something
6 your client was interested in, based on his
7 communication with you.

8 THE COURT: I'll allow the question as
9 modified. Go ahead.

10 THE WITNESS: Well, the part that I have
11 trouble with in the question is you say, "From the
12 very beginning." I would say that's not true. I
13 would say once the ramifications of what a plea in
14 abeyance meant were explored, then it became
15 something he was not interested in, yes.

16 Q. So the time frame in which you were
17 communicating with Mr. Huber, he knew a plea in
18 abeyance wasn't of interest?

19 A. Had to, at some point. Had to, because I
20 told him so. I told Mr. Huber that.

21 Q. Okay. You did know that John was --
22 Mr. Huber was the decision-maker as it related to
23 charging decisions?

24 A. Yes, absolutely.

25 Q. And, eventually, on plea decisions?

1 A. Yeah. I thought he gave you guys a little
2 bit of latitude there.

3 Q. But specifically on this case.

4 A. Yeah, I think he made that clear to me in
5 this case. He did. That's fair. He did.

6 I mean, this is a case that I guess, in
7 part, because of Mr. Fieeiki's employment, and in
8 part because we discussed it so early on, that he
9 seemed to me to have taken a personal interest in it.
10 I don't mean that in a negative way. It's just that
11 he had hands on the file. He was accessible to me
12 whenever I wanted to talk to him about it. It wasn't
13 just a run-of-the-mill, one of the 10,000 cases I'm
14 sure you process in your office every year.

15 Q. Your arrangement to bring Mr. Fieeiki in,
16 didn't include John being present; correct?

17 A. No, it didn't, specifically. I mean, it
18 wasn't ever anything that we talked about. But I do
19 remember sort of being surprised that he wasn't
20 there. But then again, I'm sure he had other things
21 to do. But we never said, "Hey, you're going to be
22 there, aren't you, John?" No, that just never came
23 up. I just assumed that since he wanted to make this
24 decision, he would be; that's all.

25 Q. Especially in the context that if this

1 were to be treated as a plea negotiation, wouldn't
2 you have expected John Huber to be there as the
3 offerer of any plea?

4 A. Not since he had a deputy there. Not
5 since there was another lawyer there. If it had only
6 been an investigator, I might have been more
7 concerned. Since there was a lawyer there who was,
8 at least to my recollection, invited to participate
9 by asking questions, if he chose, I just figured
10 there was some reason John couldn't be there that
11 day.

12 Q. At any time on September 9th, did you
13 discuss different plea options with Sean Torriente or
14 Kevin Nudd?

15 A. No.

16 Q. The entire context of the interview was to
17 lay out on the table everything Mr. Fieeiki wanted us
18 to know about what happened that night?

19 A. That was definitely one of the purposes,
20 without question.

21 Q. And Mr. Nudd led the interview?

22 A. He did.

23 Q. Before recording the interview, you had a
24 discussion with Mr. Nudd as it related to the
25 Miranda; correct?

1 A. Right.

2 Q. And he discussed with you whether or not
3 to Mirandize your client formally on the record?

4 A. Right.

5 Q. And you determined with him that that was
6 not needed?

7 A. Right.

8 Q. And that was --

9 A. I think I specifically told him, either on
10 the way up from downstairs or before the tape
11 recorder was turned on, I don't recall which, that,
12 look, he wasn't in custody; he had come in
13 voluntarily; he was with a lawyer; he was a law
14 enforcement officer, himself. For all those reasons,
15 or for any one of those, I didn't think it was
16 necessary for there to be any kind of Miranda
17 warning.

18 Q. Okay.

19 A. He wasn't in custody. He'd come there on
20 his own. He was free to leave any time he wanted to.
21 He didn't need to be there. He didn't need to say
22 anything.

23 Q. None of the reasons you stated to Mr. Nudd
24 included that it would be inadmissible anyway,
25 pursuant to a plea negotiation?

1 A. Nope. That didn't ever come up that day.
2 That was never said.

3 Q. Was Mr. Fieeiki present during this
4 conversation off the record about the Miranda?

5 A. He was never more than three feet away
6 from me that entire morning, so I assume so.

7 Q. Okay. And Mr. Nudd did record the
8 interview; correct?

9 A. He did.

10 Q. And at no time did you object to the
11 interview being recorded?

12 A. No.

13 Q. And at the beginning of his --

14 MR. ROBINSON: If I could approach with a
15 copy of the transcript that the Court already has
16 admitted as evidence.

17 THE COURT: You may.

18 Q. (By Mr. Robinson) Even after you had this
19 conversation with Kevin Nudd, he did put on the
20 record that you had reviewed -- he stated:

21 "Having already reviewed with you and your
22 attorney, Mr. Brass, I'm not going to read the
23 Miranda rights to you;" correct?

24 A. He did.

25 Q. But he did discuss with -- that he wanted

1 Mr. Fieeiki to understand that he had the right to
2 talk to you and that you were present and that he was
3 giving the statement willingly?

4 A. He did say that.

5 Q. That nothing -- he had not been coerced
6 into giving the statement, for example?

7 THE COURT: Mr. Robinson, the statement
8 speaks for itself. I'm taking it, Mr. Drake,
9 Mr. Brown, you have no objection to the Court
10 receiving the exhibit that was previously admitted
11 with the memorandums?

12 MR. DRAKE: Well, your Honor, I was just
13 looking through this exhibit to see if -- I haven't
14 seen it. I don't know what he's handed to him unless
15 it's the redacted --

16 THE COURT: I guess my point is I don't
17 think that Mr. Brass needs to be asked questions that
18 are part of the interview.

19 MR. DRAKE: Fair enough. It's part of the
20 record.

21 THE COURT: It's part of the record,
22 unless there is an objection.

23 MR. DRAKE: I agree.

24 THE COURT: If there is no objection,
25 then, to the Court receiving this interview that's

1 previously been -- I'm not sure which side sent it to
2 me, but it came in with one of the memorandums.

3 MR. DRAKE: If I may just ask, your Honor,
4 is the copy that you have redacted? Does it have X's
5 through it?

6 THE COURT: I don't believe so.

7 MR. ROBINSON: I believe both the original
8 and the redacted ones covered the information that I
9 am referring to on page 1 and page 2.

10 THE COURT: That was my point. I'm trying
11 to save you some time. You don't need to go into
12 that as part of the transcript.

13 MR. ROBINSON: Fair enough.

14 MR. BROWN: We have no objection, your
15 Honor. It's my understanding that the copy the Court
16 has is a redacted version. However, it is what we
17 call a "clean copy." We worked through it with the
18 prosecution, so we have no objection to that.

19 THE COURT: All right. With that, I don't
20 think there is any reason to ask Mr. Brass. That's
21 part of the record. You can argue it when you deem
22 appropriate.

23 Q. (By Mr. Robinson) Your affidavit states
24 that Mr. Fieeiki desired to meet with the prosecutor
25 for settlement discussions. Do the words -- well,

1 I'll leave that for argument, as well. Strike that.

2 What do you recall about your conversation
3 subsequent with Mr. Huber, subsequent to this
4 interview? At any time did he make an offer --

5 A. Absolutely. What I told you earlier, and
6 that was that a plea in abeyance was as good as it's
7 going to get. And that offer remained open, to the
8 best of my recollection, until -- I think it was
9 open when I left the case, I think it was still open.

10 MR. ROBINSON: Okay.

11 THE COURT: Any redirect?

12 MR. DRAKE: Just a few, your Honor.

13

14 REDIRECT EXAMINATION.

15 BY MR. DRAKE:

16 Q. How long have you been a defense attorney?

17 A. Just about 28 years.

18 Q. So you wouldn't just have taken the
19 defendant to the interview unless you expected this
20 to be negotiations; correct?

21 A. Well, it would be pointless to have him go
22 in and just make a statement with no intended
23 purpose.

24 Q. Right. Now, in this question that
25 Mr. Robinson asked you earlier, about going to the

1 office and that sort of thing regarding the taking of
2 the statement, did you -- you anticipated, though, at
3 the beginning that this statement that was being
4 taken was in furtherance of your discussions with
5 Mr. Huber?

6 A. There is no question that the purpose of
7 the statement was to allow them to assess what they
8 were going to do in terms of charging and settling
9 the case. And/or settling the case. There's no
10 question about it.

11 MR. DRAKE: Nothing further.

12 THE COURT: Anything else? All right.
13 Thank you, Mr. Brass, for appearing. You are
14 excused.

15 THE WITNESS: Thank you.

16 THE COURT: Any more witnesses, Mr. Drake?

17 MR. DRAKE: If I may have one moment. We
18 have no more witnesses at this time, but we may have
19 a rebuttal.

20 THE COURT: That's fine. Mr. Robinson,
21 you said you had some witnesses?

22 MR. ROBINSON: I do.

23 THE COURT: All right. Call your first
24 witness.

25 MR. ROBINSON: I'll call Mr. Huber.

AFFIDAVIT OF ED BRASS

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Telephone 801/964-6200

Co-Counsel for Defendant

**IN THE THIRD DISTRICT COURT OF THE STATE OF UTAH
SALT LAKE COUNTY, WEST VALLEY CITY DEPARTMENT**

STATE OF UTAH,)	AFFIDAVIT OF EDWARD K. BRASS
)	IN SUPPORT OF DEFENDANT'S MOTION
Plaintiff,)	IN LIMINE
)	
vs.)	
)	Case No. 041100172 MO
STANLEY B. FIEEIKI,)	
)	Judge Terry L. Christiansen
Defendant.)	

STATE OF UTAH)
 ss
County of Salt Lake)

EDWARD K. BRASS, being first duly sworn upon oath, deposes and says

1. I have personal knowledge of the facts stated herein and if required to do so I could and would competently testify thereto

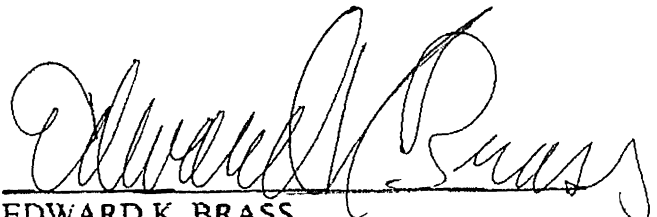
2. Prior to September 9, 2003, I represented Stanley B. Fieeiki in a criminal matter being considered for filing by the West Valley City Prosecutor's office.

3. Prior to September 9, 2003, John Huber and I were engaged in settlement discussions

seeking a resolution of the criminal matter Mr. Fieeiki desired to meet in person with the prosecutor for settlement discussions to attempt to settle the charges before they were filed. Pursuant to these settlement discussions, a meeting between the prosecutor, Stanley Fieeiki and me was arranged This meeting occurred September 9, 2003.

4. My understanding of the sole purpose of the meeting between the above-named individuals was to discuss settlement, Mr Fieeiki was to tell his side of the case so a settlement offer could be assessed and made. Ultimately, such an offer was made

DATED September 1, 2004.

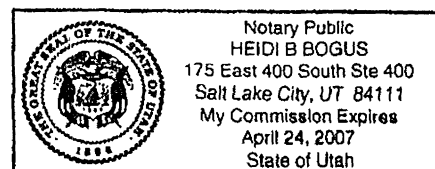

EDWARD K. BRASS

SUBSCRIBED AND SWORN TO before me September 1, 2004.


Notary Public

My Commission Expires:

April 24, 2007



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R. 328: 68

MR. FIEEIKI'S TESTIMONY
REGARDING HIS PURPOSE IN ATTENDING THE INTERVIEW

1 that occurred. So I was reluctant and did not want
2 to do that.

3 Q. Did Mr. Brass ever, in his assurances to
4 you that it would be okay to attend this meeting,
5 ever make any statements to you to the effect that
6 whatever you said there wouldn't be able to be used
7 against you?

8 A. Yes.

9 Q. He said that?

10 A. Yes. On more than one occasion. As we
11 were arriving at the Prosecutor's office and also as
12 we were going upstairs. But he reassured me that
13 everything would be okay, and he would take care of
14 everything.

15 Q. Your expectation, then, at the meeting was
16 what?

17 A. My expectation at the meeting was to tell
18 them what had happened and to get this matter
19 resolved by a dismissal, not by -- not accepting a
20 plea in abeyance. Hopefully maybe something other
21 than a plea in abeyance. But that was all that was
22 on the table at that time.

23 Q. And the purpose would be, then, for --
24 strike that. That's already been asked and answered.

25 I have nothing further.