

2006

Utah v. Harold Eugene Harmon : Brief of Appellant

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.

Mark Shurtleff; Attorney General; Attorney for Appellee.

Randall W. Richards; The Public Defender Association, Inc. of Weber County; Attorney for Appellant.

Recommended Citation

Brief of Appellant, *Utah v. Harmon*, No. 20060027 (Utah Court of Appeals, 2006).
https://digitalcommons.law.byu.edu/byu_ca2/6231

This Brief of Appellant 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

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
VS.	:	
HAROLD EUGENE HARMON,	:	Case No. 20060027-CA
Defendant/Appellant.	:	

BRIEF OF APPELLANT

THIS APPEAL IS FROM A FINDING OF GUILTY OF DISTRIBUTING A CONTROLLED SUBSTANCE IN A DRUG FREE ZONE, TO-WIT: METHADONE, A FIRST-DEGREE FELONY IN VIOLATION OF U.C.A. § 58-37-8. IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR WEBER COUNTY, STATE OF UTAH, THE HONORABLE ERNIE W. JONES PRESIDING.

MARK SHURTLEFF
Attorney General
160 East 300 South, 6th Floor
Salt Lake City, Utah 84114-0854

Telephone: (801) 366-0100

Attorney for Plaintiff/Appellee

RANDALL W. RICHARDS (4503)
THE PUBLIC DEFENDER
ASSOCIATION, INC. OF WEBER
COUNTY
2550 Washington Boulevard
Ogden, Utah 84401

Telephone: (801) 399-4191

Attorney for Defendant/Appellant

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
vs.	:	
HAROLD EUGENE HARMON,	:	Case No. 20060027-CA
	:	
Defendant/Appellant.	:	

BRIEF OF APPELLANT

THIS APPEAL IS FROM A FINDING OF GUILTY OF DISTRIBUTING A CONTROLLED SUBSTANCE IN A DRUG FREE ZONE, TO-WIT: METHADONE, A FIRST-DEGREE FELONY IN VIOLATION OF U.C.A. § 58-37-8. IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR WEBER COUNTY, STATE OF UTAH, THE HONORABLE ERNIE W. JONES PRESIDING.

MARK SHURTLEFF
Attorney General
160 East 300 South, 6th Floor
Salt Lake City, Utah 84114-0854

Telephone: (801) 366-0100

Attorney for Plaintiff/Appellee

RANDALL W. RICHARDS (4503)
THE PUBLIC DEFENDER
ASSOCIATION, INC. OF WEBER
COUNTY
2550 Washington Boulevard
Ogden, Utah 84401

Telephone: (801) 399-4191

Attorney for Defendant/Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES	i
JURISDICTIONAL STATEMENT.....	1
ISSUE ON APPEAL AND STANDARD OF REVIEW	1
CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES	2
STATEMENT OF THE CASE	9
STATEMENT OF THE FACTS.....	11
SUMMARY OF ARGUMENT.....	14
ARGUMENT	15
CONCLUSION	20
CERTIFICATE OF MAILING	20

ADDENDA:

Addendum A: Statement, Commitment & Judgment

Addendum B: Letter to Client

Addendum C: Letter from Client

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Anders v. California</i> , 386 U.S. 738 (1967).....	14, 19
--	--------

UTAH STATE CASES

<i>State v. Benvenuto</i> , 983 P.2d 556, 558.....	15
<i>State v. Blair</i> , 868 P.2d 802, 805 (Utah 1993).....	2
<i>State v. Clayton</i> , 639 P.2d (Utah 1981)	14
<i>State v. Corwell</i> , 114 P.3d 569 (Utah 2005)	15
<i>State v. Dean</i> , 95 P.3d 276 (Utah 2004)	15
<i>State v. Gallegos</i> , 738 P.2d 1040, 1041 (Utah 1987).....	2
<i>State v. Gibbons</i> , 740 P.2d 1309, 1312 (Utah 1987).....	15
<i>State v. Mora</i> , (2003 Ut App 117 ¶ 16)	1
<i>State v. Ostler</i> , 996 P.2d 1065, 1068 (Ut. Ct. App. 2000)	15
<i>State v. Thurman</i> , 911 P.2d 371, 372 (Utah 1996)	15

STATUTES AND RULES

UTAH CODE ANNOTATED

§58-37-8	1, 9
§78-2A-3(2)(j).....	1

UTAH RULES OF CRIMINAL PROCEDURE

Rule 11(e).....	8, 15, 16
-----------------	-----------

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
vs.	:	
HAROLD EUGENE HARMON,	:	Case No. 20060027-CA
Defendant/Appellant.	:	

BRIEF OF APPELLANT

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a finding of guilty of Distributing a Controlled Substance in a drug free zone, to-wit: methadone, a first-degree felony in violation of U.C.A. § 58-37-8. This court has jurisdiction over this appeal pursuant to U.C.A. § 78-2A-3(2)(j).

STATEMENT OF ISSUES ON APPEAL AND STANDARD OF REVIEW

DID THE TRIAL COURT ERR IN FAILING TO GRANT DEFENDANT’S MOTION TO WITHDRAW HIS PLEA OF GUILTY?

PRESERVATION: This issue was properly preserved for appeal by the timely filing of a motion to withdraw his plea which was denied. (R. 090)

STANDARD OF REVIEW: The Court in the case of *State v. Mora*, (2003 Ut App 117 ¶ 16) has held: “The ‘withdrawal of a plea of guilty is a

privilege, not a right . . . [and] is within the sound discretion of the trial court.’
State v. Gallegos, 738 P.2d 1040, 1041 (Utah 1987). Thus, ‘[w]e review a trial
court's denial of a motion to withdraw a guilty plea under an abuse-of-
discretion standard.’ *State v. Blair*, 868 P.2d 802, 805 (Utah 1993).”

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

UTAH CODE ANNOTATED

58-37-8. Prohibited acts -- Penalties.

(1) Prohibited acts A -- Penalties:

(a) Except as authorized by this chapter, it is unlawful for any person to knowingly and intentionally:

(i) produce, manufacture, or dispense, or to possess with intent to produce, manufacture, or dispense, a controlled or counterfeit substance;

(ii) distribute a controlled or counterfeit substance, or to agree, consent, offer, or arrange to distribute a controlled or counterfeit substance;

(iii) possess a controlled or counterfeit substance with intent to distribute;

or

(iv) engage in a continuing criminal enterprise where:

(A) the person participates, directs, or engages in conduct which results in any violation of any provision of Title 58, Chapters 37, 37a, 37b, 37c, or 37d that is a felony; and

(B) the violation is a part of a continuing series of two or more violations of Title 58, Chapters 37, 37a, 37b, 37c, or 37d on separate occasions that are undertaken in concert with five or more persons with respect to whom the person occupies a position of organizer, supervisor, or any other position of management.

(b) Any person convicted of violating Subsection (1)(a) with respect to:

(i) a substance classified in Schedule I or II, a controlled substance analog, or gammahydroxybutyric acid as listed in Schedule III is guilty of a second-degree felony and upon a second or subsequent conviction is guilty of a first-degree felony;

(ii) a substance classified in Schedule III or IV, or marijuana, is guilty of a third degree felony, and upon a second or subsequent conviction is guilty of a second degree felony; or

(iii) a substance classified in Schedule V is guilty of a class A misdemeanor and upon a second or subsequent conviction is guilty of a third degree felony.

(c) Any person who has been convicted of a violation of Subsection (1)(a)(ii) or (iii) may be sentenced to imprisonment for an indeterminate term as provided by law, but if the trier of fact finds a firearm as defined in Section **76-10-501** was used, carried, or possessed on his person or in his immediate possession during the commission or in furtherance of the offense, the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently.

(d) Any person convicted of violating Subsection (1)(a)(iv) is guilty of a first degree felony punishable by imprisonment for an indeterminate term of not less than seven years and which may be for life. Imposition or execution of the sentence may not be suspended, and the person is not eligible for probation.

(2) Prohibited acts B -- Penalties:

(a) It is unlawful:

(i) for any person knowingly and intentionally to possess or use a controlled substance analog or a controlled substance, unless it was obtained under a valid prescription or order, directly from a practitioner while acting in the course of his professional practice, or as otherwise authorized by this chapter;

(ii) for any owner, tenant, licensee, or person in control of any building, room, tenement, vehicle, boat, aircraft, or other place knowingly and intentionally to permit them to be occupied by persons unlawfully possessing, using, or distributing controlled substances in any of those locations; or

(iii) for any person knowingly and intentionally to possess an altered or forged prescription or written order for a controlled substance.

(b) Any person convicted of violating Subsection (2)(a)(i) with respect to:

(i) marijuana, if the amount is 100 pounds or more, is guilty of a second degree felony;

(ii) a substance classified in Schedule I or II, marijuana, if the amount is more than 16 ounces, but less than 100 pounds, or a controlled substance analog, is guilty of a third degree felony; or

(iii) marijuana, if the marijuana is not in the form of an extracted resin from any part of the plant, and the amount is more than one ounce but less than 16 ounces, is guilty of a class A misdemeanor.

(c) Upon a person's conviction of a violation of this Subsection (2) subsequent to a conviction under Subsection (1)(a), that person shall be sentenced to a one-degree greater penalty than provided in this Subsection (2).

(d) Any person who violates Subsection (2)(a)(i) with respect to all other controlled substances not included in Subsection (2)(b)(i), (ii), or (iii), including less than one ounce of marijuana, is guilty of a class B misdemeanor. Upon a second conviction the person is guilty of a class A misdemeanor, and upon a third or subsequent conviction the person is guilty of a third degree felony.

(e) Any person convicted of violating Subsection (2)(a)(i) while inside the exterior boundaries of property occupied by any correctional facility as defined in Section **64-13-1** or any public jail or other place of confinement shall be sentenced to a penalty one degree greater than provided in Subsection (2)(b), and if the conviction is with respect to controlled substances as listed in:

(i) Subsection (2)(b), the person may be sentenced to imprisonment for an indeterminate term as provided by law, and:

(A) the court shall additionally sentence the person convicted to a term of one year to run consecutively and not concurrently; and

(B) the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently; and

(ii) Subsection (2)(d), the person may be sentenced to imprisonment for an indeterminate term as provided by law, and the court shall additionally sentence the person convicted to a term of six months to run consecutively and not concurrently.

(f) Any person convicted of violating Subsection (2)(a)(ii) or (2)(a)(iii) is:

(i) on a first conviction, guilty of a class B misdemeanor;

(ii) on a second conviction, guilty of a class A misdemeanor; and

(iii) on a third or subsequent conviction, guilty of a third degree felony.

(g) A person is subject to the penalties under Subsection (4)(c) who, in an offense not amounting to a violation of Section **76-5-207**:

(i) violates Subsection (2)(a)(i) by knowingly and intentionally having in his body any measurable amount of a controlled substance; and

(ii) operates a motor vehicle as defined in Section **76-5-207** in a negligent manner, causing serious bodily injury as defined in Section **76-1-601** or the death of another.

(3) Prohibited acts C -- Penalties:

(a) It is unlawful for any person knowingly and intentionally:

(i) to use in the course of the manufacture or distribution of a controlled substance a license number which is fictitious, revoked, suspended, or issued to another person or, for the purpose of obtaining a controlled substance, to assume the title of, or represent himself to be, a manufacturer, wholesaler, apothecary, physician, dentist, veterinarian, or other authorized person;

(ii) to acquire or obtain possession of, to procure or attempt to procure the administration of, to obtain a prescription for, to prescribe or dispense to any person known to be attempting to acquire or obtain possession of, or to procure the administration of any controlled substance by misrepresentation or failure by the person to disclose his receiving any controlled substance from another source, fraud, forgery, deception, subterfuge, alteration of a prescription or written order for a controlled substance, or the use of a false name or address;

(iii) to make any false or forged prescription or written order for a controlled substance, or to utter the same, or to alter any prescription or written order issued or written under the terms of this chapter; or

(iv) to make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling so as to render any drug a counterfeit controlled substance.

(b) Any person convicted of violating Subsection (3)(a) is guilty of a third degree felony.

(4) Prohibited acts D -- Penalties:

(a) Notwithstanding other provisions of this section, a person not authorized under this chapter who commits any act declared to be unlawful under this section, Title 58, Chapter 37a, Utah Drug Paraphernalia Act, or under Title 58, Chapter 37b, Imitation Controlled Substances Act, is upon conviction subject to the penalties and classifications under this Subsection (4) if the trier of fact finds the act is committed:

(i) in a public or private elementary or secondary school or on the grounds of any of those schools;

- (ii) in a public or private vocational school or postsecondary institution or on the grounds of any of those schools or institutions;
 - (iii) in those portions of any building, park, stadium, or other structure or grounds which are, at the time of the act, being used for an activity sponsored by or through a school or institution under Subsections (4)(a)(i) and (ii);
 - (iv) in or on the grounds of a preschool or child-care facility;
 - (v) in a public park, amusement park, arcade, or recreation center;
 - (vi) in or on the grounds of a house of worship as defined in Section **76-10-501**;
 - (vii) in a shopping mall, sports facility, stadium, arena, theater, movie house, playhouse, or parking lot or structure adjacent thereto;
 - (viii) in a public parking lot or structure;
 - (ix) within 1,000 feet of any structure, facility, or grounds included in Subsections (4)(a)(i) through (viii);
 - (x) in the immediate presence of a person younger than 18 years of age, regardless of where the act occurs; or
 - (xi) for the purpose of facilitating, arranging, or causing the transport, delivery, or distribution of a substance in violation of this section to an inmate or on the grounds of any correctional facility as defined in Section **76-8-311.3**.
- (b) A person convicted under this Subsection (4) is guilty of a first-degree felony and shall be imprisoned for a term of not less than five years if the penalty that would otherwise have been established but for this subsection would have been a first-degree felony. Imposition or execution of the sentence may not be suspended, and the person is not eligible for probation.
- (c) If the classification that would otherwise have been established would have been less than a first degree felony but for this Subsection (4), a person convicted under Subsection (2)(g) or this Subsection (4) is guilty of one degree more than the maximum penalty prescribed for that offense.
- (d) (i) If the violation is of Subsection (4)(a)(xi):
- (A) the person may be sentenced to imprisonment for an indeterminate term as provided by law, and the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and
 - (B) the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently; and

(ii) the penalties under this Subsection (4)(d) apply also to any person who, acting with the mental state required for the commission of an offense, directly or indirectly solicits, requests, commands, coerces, encourages, or intentionally aids another person to commit a violation of Subsection (4)(a)(xi).

(e) It is not a defense to a prosecution under this Subsection (4) that the actor mistakenly believed the individual to be 18 years of age or older at the time of the offense or was unaware of the individual's true age; nor that the actor mistakenly believed that the location where the act occurred was not as described in Subsection (4)(a) or was unaware that the location where the act occurred was as described in Subsection (4)(a).

(5) Any violation of this chapter for which no penalty is specified is a class B misdemeanor.

(6) (a) Any penalty imposed for violation of this section is in addition to, and not in lieu of, any civil or administrative penalty or sanction authorized by law.

(b) Where violation of this chapter violates a federal law or the law of another state, conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this state.

(7) In any prosecution for a violation of this chapter, evidence or proof which shows a person or persons produced, manufactured, possessed, distributed, or dispensed a controlled substance or substances, is prima facie evidence that the person or persons did so with knowledge of the character of the substance or substances.

(8) This section does not prohibit a veterinarian, in good faith and in the course of his professional practice only and not for humans, from prescribing, dispensing, or administering controlled substances or from causing the substances to be administered by an assistant or orderly under his direction and supervision.

(9) Civil or criminal liability may not be imposed under this section on:

(a) any person registered under the Controlled Substances Act who manufactures, distributes, or possesses an imitation controlled substance for use as a placebo or investigational new drug by a registered practitioner in the ordinary course of professional practice or research; or

(b) any law enforcement officer acting in the course and legitimate scope of his employment.

(10) If any provision of this chapter, or the application of any provision to any person or circumstances, is held invalid, the remainder of this chapter shall be given effect without the invalid provision or application.

Utah Rules of Criminal Procedure;

Rule 11(e)

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

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

(2) the plea is voluntarily made;

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

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

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

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

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

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

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

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

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

STATEMENT OF THE CASE

The Defendant was originally charged with the crimes of manslaughter in violation of UCA §76-5-205, two counts of distribution of a controlled substance in a drug free zone, in violation of UCA § 58-37-8, and possession of drug paraphernalia a class A misdemeanor in violation of UCA §58-37a-5. A preliminary hearing was held on May 17, 2005, and the trial court took the manslaughter charge under advisement subject to memoranda from both sides. On July 20, 2005, the court dismissed the manslaughter charge and bound the Defendant over for trial on the remaining charges. Meanwhile, the Defendant had also been charged in a separate information with the charge of possession with intent to distribute a controlled substance on another occasion in violation of UCA § 58-37-8. That charge was also a first-degree felony based on the fact that it also was alleged to have occurred in a drug free zone and it was alleged

that the Defendant had prior convictions. The Defendant was also charged with other lesser charges, which were ultimately dismissed as part of the plea bargain.

On August 31, 2005, the Defendant changed his plea pursuant to a plea negotiation in which the Defendant pled guilty to the first degree felony distribution charge and the prosecution dropped the drug free zone language on the second first-degree felony possession with the intent to distribute charge, making that a second degree felony to which the Defendant pled guilty.

On September 7, 2005, the Defendant filed a pro se motion to withdraw his plea. (R. 090) A hearing on that motion was held on September 14, 2005. At that hearing the Defendant elected to withdraw his motion with respect to the second degree felony case, but wanted to go forward on the motion to withdraw his plea on the first degree felony charge. A hearing was set for October 5, 2005, on that motion, at which time the court instructed both sides to prepare memoranda on the issue.

On November 9, 2005, the court denied the Defendant's motion to withdraw his guilty plea based on the statement in advance of guilty plea signed by the Defendant and based on the plea colloquy in open court prior to the taking of the guilty plea.

The Defendant was sentenced on December 12, 2005, to an indeterminate term in the Utah State Prison of not less than five years that may be for life. (R. 117)

STATEMENT OF THE FACTS

On August 3, 2004, the police went to the house of the Defendant to investigate the death of Mr. Gordon. He had died earlier in the evening of August 3rd. The officers talked to the Defendant, and after reading him his Miranda rights questioned him about the death. (R. 146 / 23) The Defendant said that Mr. Gordon had repeatedly asked him for some methadone to calm him down and then admitted giving Mr. Gordon some of his methadone “because he was in such a state I couldn’t turn him down”. (R. 146/ 23) The Defendant admitted that he had observed Mr. Gordon smoke speed and some cocaine on Sunday night, August 1, 2004. (R. 146 / 23) Testimony of Detective Reeves confirmed that the death occurred within 1000 feet of a drug free zone. (R. 146 / 45)

Further investigation revealed that the Defendant had received the methadone from a clinic in Bountiful, and that on January 22, 2004, the Defendant had signed a form in which he acknowledged that he had been given a booklet that had information regarding the use of his methadone prescription. The booklet instructs the user not to share the methadone with anyone since

they may not have built up a tolerance to the drug. It also related that the use of methadone alone or in conjunction with other drugs could “create a life threatening hazard.” (R. 146 / 29, 26)

On August 4, 2004, Dr. Frikke of the Utah State Medical Examiners office conducted an autopsy on Mr. Gordon and determined that he had died of drug poisoning from a combination of methamphetamine, methadone, and cocaine. (R. 146 / 7) Dr. Frikke opined that it was possible that the single dosage of methadone may have been capable of causing death; but that it was the combination of the drugs that most certainly caused the death of Mr. Gordon. (R. 146 / 12-14) Dr. Frikke also discovered that Mr. Gordon did not have a prescription for any of the above listed drugs. (R. 146 / 14)

In a separate information the Defendant was charged with the crime of possession of a controlled substance with intent to distribute. On August 31, 2005, the Defendant pled guilty pursuant to a plea negotiation to one first-degree felony distribution of a controlled substance in a drug free zone (in conjunction with the Mr. Gordon case) and to one amended count of distribution of a controlled substance, a second-degree felony in the other case.

On September 9, 2005, the Defendant filed a motion to withdraw his plea on the first-degree felony charge (electing to accept the second-degree felony plea taken at the same time), and a hearing was held on November 9,

2005. At that hearing the Defendant told the court that the reason for his motion to withdraw his guilty plea was “ineffective assistance and diligence.” (R. 149 / 3) The Defendant told the court “ Well, he, you know, he – we were going to trial on the, you know, on the other thing – and he never even mentioned these – going to trial on this other stuff, know what I mean, and I told him I wanted to go to trial on it. I said I’m not guilty, you know.” (R. 149 / 3) The court explained to the Defendant that a motion to withdraw a plea would be granted based only on what was said in open court and what was contained in the plea statement. The court explained to the Defendant that it recalled asking him if he had had enough time to talk to his attorney. (The court had in fact asked, “Have you had enough time to talk to [your attorney] about this plea? to which the Defendant said yes. And “ do you need any more time.” to which the Defendant said “no.” (R. 145 /10)) The court also noted that the Defendant had signed a statement in advance of a guilty plea in open court. (Addendum B)

The trial court then asked for additional grounds to which the Defendant replied, “I just didn’t feel like I was, you know, justly represented.” (R. 149 / 4) The court inquired why the Defendant had said “no” when asked if he needed more time to talk to his attorney, and the Defendant stated, “Because I was scared, to be totally honest with you. I mean I was, your honor, I really was.”

(R. 149 / 4) The Defendant told the court, “ I guess like what he tells you back [in the holding cell adjacent to the courtroom] ... is totally different than what he says to you, I mean, how can I, you know, I don’t know –I don’t know where I’m supposed to come up with the right words for you.” (R. 149 / 5)

The trial court denied the motion to withdraw the guilty plea based on the statement in advance of guilty plea signed by the Defendant and based on the plea colloquy in open court. (R. 149 / 7)

SUMMARY OF ARGUMENT

The determinative issue of the Defendant on appeal is whether the trial court improperly denied the Defendant’s motion to withdraw his guilty plea. Based upon the Rule 11 colloquy conducted at the plea hearing, and based upon the fact that the defendant executed and acknowledged reading and understanding the statement in support of guilty plea document, the trial court properly followed the requirements of Rule 11.

After having reviewed the case law together with all these factors, defense counsel has been unable to find any non-frivolous issues to appeal. For this reason, this brief is being filed in accordance with the guidelines set forth in *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clayton*, 639 P.2d (Utah 1981).

ARGUMENT

Utah Rules of Criminal Procedure; Rule 11(e) provides a guideline that a trial court must follow in the taking of a plea of guilty. The application of this Rule has been held by the Supreme Court of the State of Utah to require strict compliance. In the case of *State v. Ostler*, 996 P.2d 1065, 1068 (Ut. Ct. App. 2000) the Court held:

“Rule 11(e) squarely places on trial courts the burden of ensuring that constitutional and Rule 11(e) requirements are complied with when a guilty plea is entered.” *State v. Benvenuto*, 983 P.2d 556, 558 (quoting *State v. Gibbons*, 740 P.2d 1309, 1312 (Utah 1987)). The trial court must strictly adhere to Rule 11(e). See *State v. Thurman*, 911 P.2d 371, 372 (Utah 1996). (emphasis added)

This “strict compliance” requirement replaced the former “substantial compliance” requirement before a plea can be taken. (See *State v. Thurman*, 911 P.2d 371, 372 (Utah 1996) where the Court held, “Gibbons created a ‘strict compliance’ rule requiring that a trial court ‘personally establish... that the defendant... understood the elements of the crime’”).)

The Rule 11 colloquy utilized during the taking of a plea of guilty must establish this “strict compliance” for each element of the plea. Although the extent of this strict compliance requirement has been recently reviewed by the Utah Supreme Court in the cases of *State v. Dean*, 95 P.3d 276 (Utah 2004) and *State v. Corwell*, 114 P.3d 569 (Utah 2005), the requirement of the court taking a plea of guilty remains one of strict compliance. In determining

whether each of these Rule 11 requirements were appropriately adhered to in the case at bar it is necessary to review each element in conjunction with the trial court's efforts at compliance.

Utah Rules of Criminal Procedure, Rule 11(e) provides “ The court may refuse to accept a plea of guilty, no contest or guilty and mentally ill, and may not accept the plea until the court has found:

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

(2) the plea is voluntarily made;

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

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

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

(5) the defendant knows the minimum and maximum sentence, and if applicable, the minimum mandatory nature of the minimum sentence, that may be imposed for each offense to which a plea is

entered, including the possibility of the imposition of consecutive sentences;

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

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

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

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

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

In the case at bar the Defendant read and executed a statement in support of a guilty plea. (see Addendum B) That document clearly addressed each of the above elements of Rule 11 in great detail. The trial court asked the defendant if he had read the statement in advance of guilty plea to which the defendant said, “yes sir” (R. 145 / 9). The trial court described to the Defendant what he was pleading guilty to and the Defendant stated that he thought he was pleading to two-second degree felonies. The court told the Defendant that the proposal was to a second and a first, and asked “[Do] you

understand the difference?”, to which the Defendant replied, “ Yes, sir. Quite a bit different.” (R. 145 / 9) The trial court then asked the Defendant, “No one’s putting any pressure on you to enter this plea today?” To which the Defendant answered, “no, sir.” (R. 145 / 9) The Defendant acknowledged that he had had enough time to talk to his attorney and didn’t need any more time to talk to his attorney. (R. 145 / 10)

The trial court and defense counsel then described the elements of the offense and the factual basis for the plea as follows:

On August [2] 2004, you did knowingly and intentionally distribute a controlled or counterfeit substance or you agreed, consented, offered, or arranged to distribute a controlled or counterfeit substance, to wit: methadone. And the offense was committed in a public parking lot structure or within a thousand feet of any structure...The defendant shared his methadone with Cheyenne Gordon. It eventually caused Mr. Gordon’s death. (R. 145 / 8)

The trial court also went through the possible maximum sentence that could be imposed (R. 145 / 7). The trial court incorporated the statement in support of guilty plea into the record. (R. 145 / 9)

At a hearing on the Defendant’s motion to withdraw his guilty plea, the trial court found that all Rule 11 requirements had been met, that the Defendant knew and understood his rights at the time of the plea, and that the Defendant had knowingly and voluntarily entered his guilty pleas.

The only issue the Defendant wanted appealed, and under the circumstances the only issue the Defendant could appeal, was the voluntariness of the entry of his guilty plea. Since all the Rule 11 requirements were followed, and since the Defendant admitted in the hearing on his motion to withdraw his plea that he understood his rights, there are no possible violations on which to appeal. For these reasons, counsel respectfully requests permission to withdraw from further representation of the Defendant.

The only claim that the Defendant makes regarding a knowing and intelligent entry of plea is a claim as follows:

The trial court then asked for additional grounds to which the defendant replied, "I just didn't feel like I was, you know, justly represented." (R. 149 / 4) The court inquired why the defendant had said no when asked if he needed more time to talk to his attorney, and the defendant stated, "Because I was scared, to be totally honest with you. I mean I was, your honor, I really was." (R. 149 / 4) The defendant told the court, " I guess like what he tells you back [in the holding cell adjacent to the courtroom] ... is totally different than what he says to you, I mean how can I, you know, I don't know -I don't know where I'm supposed to come up with the right words for you." (R. 149 / 5)

The Defendant does not claim that he was under the influence of any kind of drug or alcohol nor does he claim that he was not of a right mind.

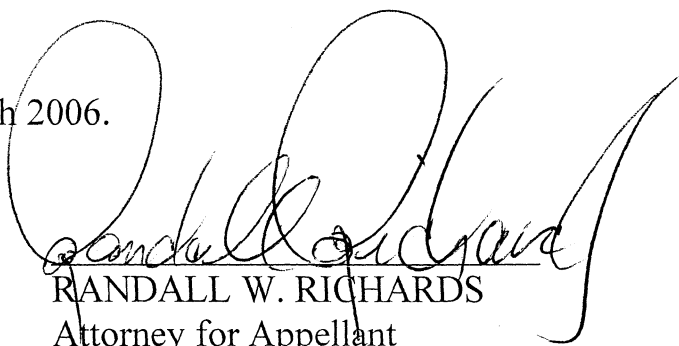
On February 22, 2006, appellant's attorney sent a letter to the appellant regarding the intention to file an Anders brief and requesting a response. (A copy of which is attached as Addendum B) On March 3, 2006, the appellant

sent a letter in response to that letter in essence claiming that he believed that he had an absolute right to withdraw his plea at any time before sentencing. He also claimed that he believed he had ineffective assistance of counsel on the basis that trial counsel told him that everything would be taken care of in his appeal. (A copy of that letter is attached as Addendum C) The appellant raised no new issues in Addendum C that had not previously been mentioned in previous letters requests.

CONCLUSION

Counsel is unable to find any non-frivolous issues to appeal. For this reason, counsel respectfully requests this Court to release him as appellate counsel.

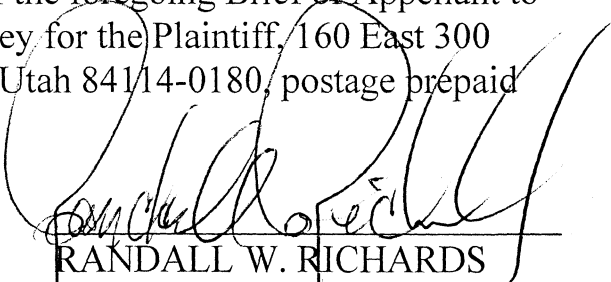
DATED this 15 day of March 2006.



RANDALL W. RICHARDS
Attorney for Appellant

CERTIFICATE OF MAILING

I certify that I mailed two copies of the foregoing Brief of Appellant to Mark Shurtleff, Attorney General, Attorney for the Plaintiff, 160 East 300 South, 6th Floor PO Box 140854 SLC, Utah 84114-0180, postage prepaid this 15 day of March, 2006.



RANDALL W. RICHARDS
Attorney at Law

ADDENDUM A

SECOND DISTRICT COURT - OGDEN COURT
WEBER COUNTY, STATE OF UTAH

STATE OF UTAH, : MINUTES
Plaintiff, : APP SENTENCING
 : SENTENCE, JUDGMENT, COMMITMENT
 :
 :
vs. : Case No: 051901670 FS
 :
HAROLD EUGENE HARMON, : Judge: ERNIE W JONES
Defendant. : Date: December 14, 2005

PRESENT

Clerk: dianew

Reporter: OLSEN, DEAN

Prosecutor: BRENDA J. BEATON

Defendant

Defendant's Attorney(s): RYAN BUSHELL (PDA)

Agency: Adult Probation and Parole

DEFENDANT INFORMATION

Date of birth: January 22, 1950

Video

CHARGES

2. DISTRIBUTE/OFFER/ARRANGE TO DIST C/S - 1st Degree Felony
Plea: Guilty - Disposition: 09/01/2005 Guilty

HEARING

This is before the Court for sentencing. Defendant
present in custody from the Weber County Jail. Court
finds no legal basis why sentence should not be imposed.

Case No: 051901670
Date: Dec 14, 2005

SENTENCE PRISON

Based on the defendant's conviction of DISTRIBUTE/OFFER/ARRANGE TO DIST C/S a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than five years and which may be life in the Utah State Prison.

COMMITMENT is to begin immediately.

To the WEBER County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

Prison term imposed to run consecutively to prison term imposed in case 051904133 FS.

Credit is granted for time served.

Dated this 14 day of Dec, 2005.

STATE OF UTAH
COUNTY OF WEBER

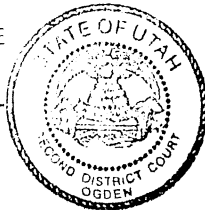
I HEREBY CERTIFY THAT THIS IS A TRUE COPY OF THE
ORIGINAL IN MY OFFICE

DATED THIS 18 day of Jan 2006

PAULA GARR
CLERK OF THE COURT

BY Kathy Chylant DEPUTY

PAGE 2 OF 2



Ernie W Jones
ERNIE W JONES
District Court Judge

ADDENDUM B

THE PUBLIC DEFENDER ASSOCIATION, INC.
OF WEBER COUNTY, STATE OF UTAH
APPELLATE DIVISION

2550 Washington Boulevard, Suite 300
Ogden, Utah 84401

Telephone: (801) 399-4191

Randall W Richards
Dee W Smith

February 22, 2006

Harold Eugene Harmon
Inmate #21598
Housing U-3-401-B
Utah State Prison
P. O. Box 250
Draper, UT 84020

Re: SOU v. Harold Eugene Harmon

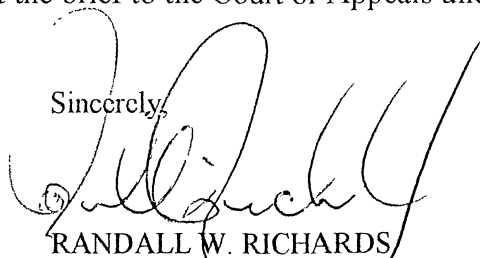
Dear Mr. Harmon,

I have been working on your appeal, and have done extensive research regarding your complaint that the Judge should have granted your motion to withdraw your guilty plea. I have not been able to find any cases to support our position on this issue. The problem is that where you told the judge at the plea hearing that you had read the plea bargain agreement and fully understood it, the Judge had no legal reason to allow your plea to be withdrawn. The fact that you may have had a question about Mr. Gravis being ineffective or not diligent, but gave no reason for that allegation, does not rise to the level required to withdraw a plea which would be that you did not knowingly enter the plea.

The Utah Appellate Courts will not change a judge's decision on this issue unless it is so obvious that you did not know the rights you were giving up when you entered the plea.

I am filing a brief saying that I can find no issue for an appeal. I have enclosed a copy of that brief for your inspection. **If you have any other issues you would like discussed on appeal, please bring them to my attention within 30 days of the date of this letter.** If I do not hear from you on further issues, I will submit the brief to the Court of Appeals unchanged.

Sincerely,



RANDALL W. RICHARDS
Attorney at Law

RWR/mm
Enclosure

ADDENDUM C

Envelope # 21578
Honoring P.C.F. H-1
Utah State Prison
PO Box 250
Draper, Utah 84020

date 03-03-06

The Public Defender Association, Inc
Of Weber County, State Of Utah
Appellate Division
2550 Washington Blvd, Suite 300
Ogden, Utah 84401

Re: S.O.U. v. Harold Eugene Harmon
Deer Run. (Randall W. Richards).

- (1) upon entering my plea of guilty, Judge Jones instructed me that I had the right if I felt uncomfortable at any time to withdraw my plea of guilty. Judge Jones did not mention nor did my attorney mention that it was a privilege or that I had to show cause if receding my plea of guilty. I was put under the impression that as I had to do now explain them in a timely manner w/in 30 days as Utah Code states.
- (2) in my letter to Judge Jones, I complained that I had ineffective counsel. I felt that ineffective assistance & due diligence was not part of my plea of guilty. Judge Jones must have agreed to my motion because Milton Lewis was no longer my counsel @ any further proceedings.
- (3) State Law guarantees my right to withdraw my plea of guilty within 30 days. At no time did Judge Jones state I would have to show cause to withdraw my plea. Thus receding of my plea was done in the time frame set by Utah Code of Laws.
- (4) Mr. Ryan Bushnell stated in open court that everything would be taken care of in my appeal.

(5) your job was to file my appeal. I feel you have worked diligently for the state to show reasons for denying my appeal. And not protecting my constitutional rights.

(6) you have come up w/ plenty of reasons to deny me of my access to the courts. Quit acting like a district attorney in this matter & start acting like a defense attorney & protect my rights or withdraw your services.

(7) I thought I made it clear in my last letter to you about the fact that the plea agreement was based on the matter of dropping count #4 possession of paraphernalia. I served 30 days community probation, \$500.00 fine & an outpatient program (Professional Services) for 16 to 20 weeks. Starting Aug. 3rd 2004. For the courts to have this charge dismissed is double jeopardy. Just on this reason alone I should be granted a new trial if not a dismissal.

(8) I did not agree to pleading guilty on the possession of heroin 2nd degree. Ryan Eastwell said Guilty. But the recorded transcripts & find a reason to become my defense attorney or have yourself removed.

I am writing a letter to the following agencies to ask for an investigation in this matter.

The A.C.L.U., Attorney General, Utah State Bar Assoc. Also the appellate court asking for your removal from this case. Because of your brief, there is a conflict of interest. Your interest are more w/ the state & your buddies @ the legal defenders office. Rather than proving that you & co. parts didn't do their job, you're willing to sell me out.

yours truly,

Harold Eugene Harmon

MARK SHURILLI,
ATTORNEY GENERAL TELE. (801)-538-7600
36 STATE CAPITOL BLDG. SLC, UTAH 84114
STATE PROSECUTORS TELE. (801) 366-0202
10 EAST 300 SOUTH SLC, UTAH 84114

MARK DECARIA, NO. 0850 TELEPHONE: (801) 399-83
WEBER COUNTY ATTORNEY FAX: (801) 399-83
THOMAS A. PARMLEY, NO. 2528
DEPUTY COUNTY ATTORNEY
180 WASHINGTON BIVD. STE. 230 OGDEN UT. 844
IN THE SECOND DIST. COURT OF WEBER C
OGDEN UTAH

RESPONDENT
STATE OF UTAH
VS.

INFORMATION.

CASE NO. (1) 851901670
(2) 851904133

PETITIONER
HAROLD EUGENE HARMON

JUDGE ERNIE JONES

PETITIONER HAROLD EUGENE HARMON HERE BY ASKS THE COURT FOR
AN ORDER TO SHOWCASE FOR. RECORDING OF GUILTY PLEA

(BECAUSE) (1) BY VIOLATING DE-
PENDANTS RIGHTS OF THE DUE PROCESS CLAUSE OF
THE 14TH AMENDMENT. REFERENCE: TRIBE AMERICAN
CONSTITUTIONAL LAW. § 11-2 (2d ed. 1988). DEFENDANT
WAS NEVER GIVEN A TRIAL BY A JURY OF HIS PEERS OR BY
COURT. DEFENDANT WAS VIOLATED OF HIS RIGHTS OF EFFEC-
TIVE LEGAL COUNCIL. 407 U.S. 25.

(2) UNDER THE 6TH AMENDMENT WHICH WAS VIOLATED
GOVERNMENT IS OBLIGATED TO PROVIDE ADEQUATE LEGAL
COUNCIL TO DEFENDANT @ NO EXPENSE. 372 U.S. 335, 334
THE ACCUSED HAS BEEN ACCORDED ADDITIONAL RIGHTS, SUCH
AS THE RIGHT TO CONDUCT HIS OR HER OWN DEFENSE AS
NECESSARY TO A FAIR TRIAL UNDER THE DUE PROCESS
CLAUSE 422 U.S. 806, 821. SCHWARTZ, CONSTITUTIONAL LAW
§ 711 (2d ed 1979).

(3) COERCION, CRIMINAL LAW, IMPROPER CONDUCT WHICH COERCES
THE DEFENDANT, INTERFERING WITH HIS ABILITY TO DE-
CIDE WHETHER OR NOT TO INCRIMINATE HIMSELF WILL
- - - U.S. SUPREME COURT. 385 U.S. 493, 494-500