

1994

Utah v. Rakes : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	No. 940624-CA
vs.	:	District Ct. No. 941900597
JOE RAKES,	:	Category 2
Defendant/Appellant.	:	

BRIEF OF APPELLANT

AN APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

THE HONORABLE JOHN A. ROKICH, PRESIDING

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COURT OF APPEALS

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :

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vs. : District Ct. No. 941900597

JOE RAKES, : Category 2

Defendant/Appellant. :

COMES NOW the Appellant to the above-captioned matter (hereinafter "Defendant"), by and through counsel, and hereby submits the following as his brief of Appellant herein:

STATEMENT OF JURISDICTION

Jurisdiction is conferred upon the Court of Appeals pursuant to Utah Code Ann. § 78-2a-3(2)(f), and the provisions of Rule 26(2)(a) of the Utah Rules of Criminal Procedure, whereby the

Defendant in a district court criminal action may take an appeal to the Utah Court of Appeals from a final order for anything other than a first degree or capital felony.

NATURE OF THE PROCEEDINGS

This appeal is from two final judgments and convictions rendered by the Honorable John A. Rokich, Judge, Third District Court in and for Salt Lake County, State of Utah. The judgments and convictions were for Distribution of a Controlled Substance, a second degree felony, in violation of Utah Code Ann. § 58-37-8 (i)(a)(ii), and Attempted Distribution of a Controlled Substance, a third degree felony, in violation of Utah Code Ann. § 58-37-8 (i)(a)(iv). In particular, Defendant appeals the District Court's denial of his motion to withdraw his guilty pleas.

DETERMINATIVE PROVISIONS, CASES, STATUTES, AND RULES, ETC.

There is no case law authority, nor statutory authority believed by Defendant to be wholly dispositive or wholly determinative of the issues raised on appeal.

STANDARD OF REVIEW

"Appellate courts "review the ultimate decision to deny a motion to withdraw a guilty plea under an abuse of discretion standard."" State v. Stilling, 856 P.2d 666, 670 (Utah Ct. App. 1993) (quoting State v. Gardner, 844 P.2d 293, 295 (Utah 1992). The findings of fact of the trial court which lead to its ultimate decision will not be set aside "unless they are clearly erroneous." Id. However, "the trial court's ruling regarding substantial compliance with constitutional and procedural requirements for

entry of a guilty plea is a question of law that is reviewed for correctness." Id., citing Willet v. Barnes, 842 P.2d 860, 861 (Utah 1992); State v. Hoff, 814 P.2d 1119, 1124-25 (Utah 1991).

Further, the Utah Court of Appeals has held that "ineffective assistance of counsel falls on the end of the spectrum subject to de novo review of the ultimate legal question of whether the defendant has received ineffective assistance of counsel in violation of the Sixth Amendment." State v. Perry, 899 P.2d 1232, 1239 (Utah Ct. App. 1995). Utah Supreme Court and Utah Court of Appeals decisions on the ineffective assistance of counsel issue have shown no deference to whatever action the trial court took in its application of the law. See State v. Lopez, 886 P.2d 1105, 1113-14 (Utah 1994); State v. Goddard, 871 P.2d 540, 545-46 (Utah 1994); State v. Strain, 885 P.2d 810, 814 (Utah Ct. App. 1994); State v. Harry, 873 P.2d 1149, 1154 (Utah Ct. App. 1994).

STATEMENT OF THE CASE

Defendant was charged in Salt Lake County, State of Utah, with the crime of Unlawful Distribution of a Controlled Substance, a Second Degree Felony, as well as Unlawful Possession of a Controlled Substance with the Intent to Distribute, a Second Degree Felony. These charges were filed under case numbers 941900595FS and 941900597FS, respectively. Defendant was also charged with other minor counts under these case numbers, as well as under case numbers 941900594 and 941900596. These case numbers were consolidated into one case. On July 18, 1994, Defendant appeared before the Honorable John A. Rokich, District Court Judge, and

entered a plea of guilty to the crimes of Attempted Possession of a Controlled Substance with the Intent to Distribute, a Third Degree Felony; as well as Distribution of a Controlled Substance, a Second Degree Felony. On August 18, 1994, thirty-one days after the entry of Defendant's pleas, Defendant's counsel filed a motion to withdraw his pleas. (R.O.A. 119). On September 21, 1994, the court entered its Findings of Fact, Conclusions of Law, and Order Denying Defendant's Motion to Withdraw Guilty Pleas. (R.O.A. 125). The trial court based its denial of Defendant's motion on its findings that the motion to withdraw the pleas was outside the thirty-day period set forth in Utah Code Ann. § 77-13-6, Defendant was sufficiently experienced in the justice system to understand fully what he was doing when he entered his pleas, and that Defendant had knowingly entered the guilty pleas. Copies of the motion for withdrawal and order denying the motion are attached hereto, designated as Appendix "A" and Appendix "B", respectively.

Defendant was sentenced to an indeterminate term of zero to five years in the Utah State Prison for the third degree felony and an indeterminate term of zero to fifteen years in the Utah State Prison for the second degree felony. The trial court ordered these sentences to run concurrently. A copy of the Judgment, Sentence, and Commitment Orders are attached hereto, designated as Appendix "C" and "D", respectively.

Defendant filed a timely Notice of Appeal on October 11, 1994. Defendant's original defense counsel was then discharged, and Defendant was appointed conflict counsel. Defendant then filed a

Motion for Extension of Time in which to File Appeal Brief as well as a Motion to Remand for Determination of Ineffective Assistance of Counsel. Defendant's Motion for Remand was denied by the Utah Court of Appeals on July 17, 1995 and again on September 1, 1995.

STATEMENT OF THE FACTS

Defendant was prosecuted in Salt Lake County, State of Utah, for the crime of Unlawful Possession of a Controlled Substance with Intent to Distribute, a second degree felony, on March 28, 1994. (Amended Information, R.O.A. 65.) Defendant was also prosecuted for driving under the influence and driving on a suspended license. (Amended Information, R.O.A. 66.) Each of these charges were brought under case number 941900597FS. Defendant was further prosecuted for Unlawful Distribution of a Controlled Substance, a second degree felony, on March 28, 1994, under case number 941900595FS. (Information, R.O.A. 08.) These cases were later consolidated. Judith A. Jensen of the Salt Lake Legal Defender Association entered an Appearance of Counsel on behalf of Defendant on March 31, 1994. (R.O.A. 11 and 72.)

The Defendant was bound over and arraigned in district court on May 9, 1994. (R.O.A. 15 and 76.) Defendant entered not guilty pleas on that date and the court scheduled a trial date. (R.O.A. 15 and 76.)

On July 18, 1994, Defendant appeared before the Court for a change of plea hearing. (R.O.A. 128.) Defendant entered a plea of guilty to the crime of unlawful distribution of a controlled substance, pursuant to Utah Code Ann. § 58-37-8 (1)(a)(ii), a

second degree felony. (R.O.A. 137.) Defendant also entered a plea of guilty to attempted possession of a controlled substance with the intent to distribute, pursuant to Utah Code Ann. § 58-37-8 (1)(a)(iv), a third degree felony. (R.O.A. 138.) The remaining counts of driving under the influence and driving on a suspended license, as well as all counts in the cases numbered 941900594, 941900596, and another circuit court case, were dismissed. (R.O.A. 140.)

When Defendant entered these pleas, Defendant was under the impression that he was not bound to his guilty pleas if he withdrew the same within thirty days. (R.O.A. 142 - 145.) Defendant felt that by entering the pleas he would have thirty days within which to speak to potential witnesses about testifying at trial. (R.O.A. 142.) Defendant believed these witnesses would be able to testify that the substance that was in Defendant's possession was not methamphetamine. (R.O.A. 145, lines 1-17.) Defendant also felt that during this time period he would have an opportunity to obtain a specific drug test on the evidence. (R.O.A. 163.)

Defendant stated at his hearing to withdraw the pleas that the substance which was in his possession was not actually methamphetamine. (R.O.A. 163.) Defendant claimed that the substance he was arrested for distributing and possessing is white powder which had been purchased legally at local gasoline stations. (R.O.A. 144, lines 3-7.) It is a legal "over-the-counter" substance to help persons stay awake.

In addition, Defendant also spoke to Mr. Crouch at the

pharmacology department at the University of Utah. (R.O.A. 148, lines 15-18.) Defendant learned that the possibility of receiving a false positive test on a substance very similar to methamphetamine is quite possible. (R.O.A. 144, lines 20-25, 145, lines 1-5.) This false positive may occur on both a police field test as well as the test which is given within the state crime lab. (R.O.A. 157, lines 8-12.) Mr. Crouch informed Defendant that he had the ability to perform a test which would prove whether or not there was a false positive result in this situation. (R.O.A. 148, lines 21-25.)

A hearing on Defendant's motion to withdraw his guilty pleas was held on September 12, 1994. The Court denied Defendant's motion. (R.O.A. 169.) The Defendant was sentenced on September 19, 1994 to serve an indeterminate term in the Utah State Prison of one to fifteen years for the second degree felony charge as well as an indeterminate term of zero to five years for the third degree felony charge, to be served concurrently. (R.O.A. 160.)

SUMMARY OF THE ARGUMENT

Defendant was prosecuted for unlawful distribution of a controlled substance and unlawful possession of a controlled substance with the intent to distribute. The second charge was later amended to attempted unlawful possession of a controlled substance with the intent to distribute. However, Defendant has maintained that the substance which was in his possession was not actually methamphetamine and was, in fact, a re-heated version of an over-the-counter product similar to "No-Doz".

At the time Defendant entered his guilty pleas, Defendant was under the impression that he would have the opportunity to withdraw the guilty pleas within thirty days. Defendant believed that within that thirty day period he would have an opportunity to contact witnesses to testify as to the true nature of the substance which was in Defendant's possession, as well as to obtain a more thorough drug test on the substance to prove that it was not methamphetamine.

Further, the elements in the statement which Defendant signed in court at the time he initially entered his plea to attempted possession of a controlled substance with the intent to distribute were not correctly stated. In particular, the form failed to list the "knowing and intentional" elements of the crime. (R.O.A. 105.) (See Affidavit of Defendant/Appellant, attached hereto and designated as Appendix "E".)

Additionally, Defendant timely requested that his attorney from the Legal Defenders Association file a motion to withdraw his guilty pleas. (See Affidavit of Defendant/Appellant, attached hereto and designated as Appendix "E".) This motion was not filed until thirty-one days after the entry of the plea, past the time limit for filing a motion to withdraw the pleas. The trial court specifically listed this as one of the reasons for which the motion to withdraw was denied.

The pleas were entered unadvisedly. Defense counsel assisted Defendant ineffectively in this matter. The plea was entered unintelligently and involuntarily. Therefore, pursuant to Rule 11

of the Utah Rules of Criminal Procedure, Defendant did not enter his pleas with full knowledge and understanding of the nature and elements of the offense, nor the relation of the law to the facts of his case. Accordingly, Defendant's pleas of guilty should be withdrawn and this matter should be remanded for trial.

ARGUMENT

I. THE TRIAL COURT ERRED IN FAILING TO SET ASIDE DEFENDANT'S PLEA OF GUILTY BECAUSE THE SAME WAS ENTERED INTO UNKNOWINGLY, UNINTELLIGENTLY, AND INVOLUNTARILY.

Defendant entered guilty pleas to the crimes of distribution of a controlled substance and attempted possession of a counterfeit substance with the intent to distribute. These pleas were entered under circumstances such that Defendant was unable to make a reasoned decision regarding entering the pleas.

Utah Code Ann. § 77-13-6 (1982) states, in relevant part, as follows:

- (1) A plea of guilty may be withdrawn at any time prior to conviction.
- (2) (a) A plea of guilty or no contest may be withdrawn only upon good cause shown and with leave of the court.
(b) A request to withdraw a plea of guilty or no contest is made by motion and shall be made within 30 days after the entry of the plea.

In addition, Rule 11(e) of the Utah Rules of Criminal Procedure mandates in part:

The court . . . may not accept the [guilty] plea until the court has found:

- . . .
- (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) 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;

. . .

Utah R. Crime. P. 11(e).

According to the Utah Supreme Court, "[t]he rationale for allowing a defendant to withdraw a guilty plea is to permit him to undo a plea which was unknowingly, unintelligently, or involuntarily made." State v. Gallegos, 738 P.2d 1040, 1041 (Utah 1987).

The Utah Supreme Court has also stated that "[t]he entry of a guilty plea involves the waiver of several important constitutional rights, including the privilege against compulsory self-incrimination, the right to a trial by jury, and the right to confront witnesses. Because the entry of such a plea constitutes such a waiver, and because the prosecution will generally be unable to show that it will suffer any significant prejudice if the plea is withdrawn, a presentence motion to withdraw a guilty plea should, in general, be liberally granted." Gallegos, at 1042.

In this matter the Defendant was under the false impression that the entry of the guilty pleas could be easily withdrawn and would also give him the opportunity to attempt to contact witnesses to testify for him on his own behalf and to obtain a new chemical

analysis on the substance. Further, Defendant's counsel had informed him that he definitely should enter the guilty pleas because he would not have an opportunity to obtain witnesses to testify in his behalf at trial. Defendant's trial counsel did not explain to him that a guilty plea could only be withdrawn for good cause. Defendant's trial counsel also did not explain to him that he could have an opportunity to attempt to locate witnesses and to obtain a more certain chemical analysis if he actually did proceed with trial rather than enter the guilty pleas.

Defendant's lack of information and lack of communication from trial counsel led him to believe that the entry of a guilty plea would "buy him time" to investigate and prepare his defense for trial. Certainly this is a situation in which Defendant entered into the plea unknowingly and unintelligently.

Further, the circumstances of this matter are such that the Defendant entered the guilty plea uninformed. "Concern for the legitimacy or truth of a guilty plea is an integral part of ascertaining the voluntariness of that plea. Utah R. Crim. P. 11 (e)(2) requires the court to find that a guilty plea is voluntarily made before it accepts it. A guilty plea cannot be voluntary if it is uninformed." State v. Breckenridge, 688 P.2d 440, 444 (Utah 1983). Additionally, this Court has stated that "[t]o withdraw a guilty plea defendant must show good cause. Good cause exists where the plea was entered involuntarily." State v. Thorup, 841 P.2d 746, 748 (Utah Ct. App. 1992).

Defendant believed that entry of the guilty pleas was a

procedure which could easily be overcome later. He was under the false impression that the pleas would be withdrawn as long as he made a motion to do so within thirty days. Defendant was unaware of the good cause requirement for withdrawing guilty pleas. It was Defendant's distinct belief that, by entering the guilty pleas, Defendant would have thirty additional days within which he would have an opportunity to speak with and obtain witnesses to testify on his behalf at trial concerning the true chemical nature of the substance with which Defendant was charged. Because Defendant's trial counsel had told him that he could not obtain such witnesses, Defendant believed that his only opportunity to establish a defense for himself, through witnesses, would be to enter a guilty plea and then use the "thirty-day period" he thought he had to speak to potential witnesses himself.

Because Defendant was uninformed, his guilty plea was involuntary. Therefore, Defendant's plea should be withdrawn.

Moreover, Defendant's pleas were involuntary because he did not have a full understanding of the law in relation to the particular facts of his case. "[B]ecause a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." McCarthy v. United States, 394 U.S. 459 (1969). See also State v. Gibbons, 740 P.2d 1309, 1312 (Utah 1987).

The record as a whole in this matter does not indicate that Defendant entered his pleas with full knowledge and understanding

of the consequences and with the full knowledge of the nature and elements of the offense to which he was entering his pleas. Specifically, the form which Defendant was given to read prior to the pleas, and which he signed in open court regarding the second degree felony was incorrect. The form itself failed to list the elements of the crime. The elements of the crime, as stated in Utah Code Ann. §58-37-8 (1)(a)(iv), are that it is unlawful for any person to **knowingly and intentionally** possess a controlled or counterfeit substance with intent to distribute. (emphasis added) However, in the form which Defendant signed, the elements of "knowing and intentional" were not listed. Therefore, the crime to which Defendant entered his plea was not properly stated to Defendant.

Further, although Rule 11(e) of the Utah Rules of Criminal Procedure creates a presumption that the plea was entered voluntarily, "the trial court's compliance with Rule 11 does not foreclose the possibility that the court abused its discretion in refusing Defendant's motion if his plea was in fact involuntary." State v. Thorup, 841 P.2d 746, 748 (Utah Ct. App. 1992). In this matter the trial court complied with the general requirements of Rule 11. But, as stated by this Court, "[m]ere general questions which ask whether a plea is 'voluntary' are insufficient under Rule 11." State v. Valencia, 776 P.2d 1332, 1335 (Utah Ct. App. 1989).

The trial court merely asked Defendant whether he had entered the pleas voluntarily. The trial court did not ask Defendant to explain his position nor to explain, in his own words, what he

believed to be the crimes that he had committed and to which he was pleading guilty. Thus, even if the trial court had strictly complied with Rule 11 guidelines, the trial court nevertheless abused its discretion because Defendant's pleas were, in fact, involuntary.

The Utah Supreme Court has stated that "[t]he court has an undoubted duty to guard against the possibility that an accused who is innocent of the crime charged may be induced to plead guilty without sufficient understanding of the nature of the charge or the consequences of his plea." Breckenridge, at 443 (quoting State v. Harris, 585 P.2d 450, 452 (Utah 1983) (holding conviction based on guilty plea could not stand)).

Even if the trial court did not engage in a specific discussion regarding the Defendant's own understanding of the consequences of entering the guilty pleas, the trial court was certainly made aware of Defendant's mistaken beliefs at the hearing on the motion to withdraw as well as at sentencing. Defendant specifically informed the trial court that he was innocent of the charged crimes and that he wanted an opportunity to prove this at trial. Defendant explained to the trial court that the substance which he possessed was not methamphetamine and specifically explained the purpose of such substance, the composition of the substance, and that it was legally held, to the trial court.

Additionally, the trial court placed great reliance on the fact that the Defendant had been involved in the criminal justice system since 1974. Such reliance was misplaced, however, because

Defendant's prior experiences in the criminal justice system had involved petty actions. Most of the charges Defendant had faced in the past had been dismissed. Defendant clearly had not been faced with a plea bargain in a felony matter prior to this case. (R.O.A. 149 - 150.)

Certainly Defendant's situation in this matter is such that he did not have a clear understanding of the charges nor their consequences. Thus, the trial court abused its discretion in refusing to allow Defendant to withdraw his pleas.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO ALLOW DEFENDANT TO WITHDRAW HIS GUILTY PLEA BECAUSE THERE WAS NOT A FACTUAL BASIS FOR THE PLEA.

The trial court should have allowed Defendant to withdraw his guilty plea in order to obtain a new drug test and to obtain witnesses to testify on his behalf at trial. There was not a sufficient factual basis upon which to base Defendant's guilty plea.

The Utah Supreme Court first enunciated the need for a factual basis for the plea as a requirement for entry of guilty pleas in State v. Breckenridge, 688 P.2d 440, 443 (Utah 1983). The Court "suggested that a valid guilty plea required a "record of facts" showing either "that the charged crime was actually committed by the defendant, or that the defendant has for some other legitimate reason intelligently and voluntarily entered such a plea". Willet v. Barnes, 842 P.2d 860, 862 (Utah 1992), quoting Breckenridge, 688 P.2d at 440.

The Willett court clarified the Breckenridge holding, "stating that the record must reveal either facts that would support the prosecution of a defendant at trial or facts that would suggest a defendant faces a substantial risk of conviction at trial, "not merely facts establishing the defendant's motivation for entering the plea."" State v. Stilling, 856 P.2d 666, 672 (Utah Ct. App. 1993), citing Willett, 842 P.2d at 862.

In the instant case, the facts simply do not support the prosecution of Defendant at trial. Defendant maintained throughout the process that he had not been in possession of methamphetamine, that he had not distributed methamphetamine, and that he did not possess methamphetamine with the intent to distribute. Defendant maintained, and specifically informed the trial court, that the substance was merely a legal "over-the-counter" item which people use to help them stay awake. Because the substance was not illegal, Defendant had not committed a crime. Accordingly, there is no factual basis with which to prosecute Defendant and there is no substantial likelihood that Defendant would be convicted at trial.

Further, there is no indication that the prosecution would be prejudiced by allowing Defendant to withdraw his pleas. Defendant merely wanted the opportunity to speak to potential witnesses and to obtain a more thorough chemical analysis of the substance in order to prove that it was not methamphetamine, but was a legal substance. Thus, the trial court abused its discretion in refusing to allow Defendant to withdraw his guilty pleas.

III. THE DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WITH REGARD TO THE ENTRY OF HIS PLEA IN THIS MATTER.

Defendant's trial counsel was ineffective in representing Defendant's interests throughout the entry of Defendant's pleas and with regard to Defendant's motion to withdraw the pleas. The Sixth Amendment right to counsel is essential to protect the fundamental right to a fair trial, the linchpin of our judicial system, and thus "plays a crucial role in the adversarial system." State v. Perry, 899 P.2d 1232, 1239 (Utah Ct. App. 1995), quoting Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984).

The landmark case of Strickland v. Washington established a firm two-pronged test which must be applied to the facts relevant to the issue of ineffective assistance of counsel. Utah appellate courts have consistently followed this framework. "In order to bring a successful ineffectiveness claim, a defendant must show that trial counsel's performance was deficient in that it "fell below an objective standard of reasonableness," and that the deficient performance prejudiced the outcome of the trial." State v. Perry, 899 P.2d 1232, 1239 (Utah Ct. App. 1995) (quoting Strickland at 687.

An ineffectiveness claim "succeeds only when no conceivable legitimate tactic or strategy can be surmised from counsel's actions." State v. Tennyson, 850 P.2d 461, 468 (Utah Ct. App. 1993) (citing State v. Moritzsky, 771 P.2d 688, 692 (Utah Ct. App. 1989)).

In this matter Defendant's trial counsel failed to advise Defendant as to the nature and elements of the crime to which Defendant was pleading guilty. Defendant's trial counsel failed to insure that the actual plea which Defendant signed in open court was correctly stated. Trial counsel failed to inform Defendant that the entry of a guilty plea was a final disposition of the matter and would only be withdrawn for good cause. Trial counsel further led Defendant to believe that he should plead guilty because he would not be able to obtain witnesses to testify on his behalf at trial.

Even more importantly, however, is that after Defendant entered the guilty pleas and determined that he wanted to withdraw the same, trial counsel failed to file the motion to withdraw within the statutory thirty-day period, despite Defendant's specific timely request to counsel. The trial court found this failure to be jurisdictional and denied the withdrawal.

Further, at the hearing on Defendant's motion to withdraw the guilty pleas, Defendant's trial counsel failed to argue the fact that the crime of attempted possession of a controlled substance with the intent to distribute had been incorrectly stated on the form which Defendant reviewed and signed in open court. Trial counsel failed to inform the court that the form had failed to list the elements of the crime. Trial counsel failed to inform the court that Defendant had been confused in his statement at the time of the pleas. The clear reason for trial counsel's failure to do so is that counsel was in a conflict at that point, having been the

one to fill out the form in the first place.

Defendant's trial counsel also did not make any arguments regarding her failure to inform Defendant as to the elements and consequences of the pleas. Defendant's trial counsel was in a conflict of interest at the point at which Defendant indicated his desire to withdraw his guilty pleas. At that point trial counsel should have withdrawn and conflict counsel should have been appointed. Instead, trial counsel attempted to handle Defendant's motion to withdraw. This created an even greater conflict of interest and damaged Defendant's position even more.

This Court has stated that it "will not second-guess trial counsel's legitimate strategic choices, however flawed those choices might appear in retrospect." Tennyson at 465 (citing Strickland, 455 U.S. at 689, 104 S.Ct. at 2065). However, trial counsel's choices in this action were not legitimate strategic choices. Trial counsel failed to withdraw from the case at the point at which Defendant indicated that he wished to withdraw his guilty pleas. Because the withdrawal of the pleas was based mainly upon trial counsel's ineffectiveness, counsel's failure to withdraw at that time only served to worsen Defendant's position. Because trial counsel did not withdraw at that time, the true reasons for Defendant's withdrawal of his plea were not reported to the trial court. Moreover, there can be no strategy in missing a jurisdictional deadline. Accordingly, Defendant was denied effective assistance of counsel in this matter and this case should be remanded.

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court. The Court should set aside Defendant's guilty pleas and should remand this matter for trial on the merits.

Respectfully submitted this _____ day of November, 1995.

CORPORON & WILLIAMS, P.C.

MARY C. CORPORON

Attorney for Defendant/Appellant

CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies of the foregoing BRIEF OF APPELLANT were mailed, first class, postage prepaid, to:

KRIS C. LEONARD #4902
Assistant Attorney General
Attorney for Appellee
124 State Capitol Building
Salt Lake City, Utah 84114

on this _____ day of November, 1995.

MARY C. CORPORON

Attorney for Defendant/Appellant

APPENDIX "A"

JUDITH A. JENSEN, #4603
Attorney for Defendant
Salt Lake Legal Defender Assoc.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111
Telephone: 532-5444


FILED
CLERK OF DISTRICT COURT
AUG 23 1994
SALT LAKE COUNTY, UTAH

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

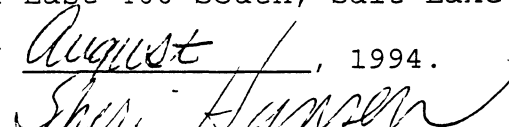
STATE OF UTAH,	:	MOTION TO WITHDRAW
	:	DEFENDANT'S GUILTY PLEA
Plaintiff,	:	
	:	
v.	:	
	:	
JOE RAKES,	:	Case No. 941900595FS
	:	JUDGE JOHN A. ROKICH
Defendant.	:	

COMES NOW the Defendant, JOE RAKES, by and through his attorney of record, JUDITH A. JENSEN, and hereby moves the Court to withdraw his guilty plea on the grounds that the plea was not entered knowingly, intelligently and voluntarily.

DATED this 19th day of August, 1994.


JUDITH A. JENSEN
Attorney for Defendant

MAILED/DELIVERED a copy of the foregoing to the Salt Lake County Attorney's Office, 231 East 400 South, Salt Lake City, Utah 84111 this 19 day of August, 1994.



JUDITH A. JENSEN, #4603
Attorney for Defendant
Salt Lake Legal Defender Assoc.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111
Telephone: 532-5444

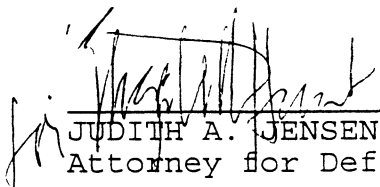
FILED
AUG 18 1994
JUDGE JOHN A. ROKICH

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

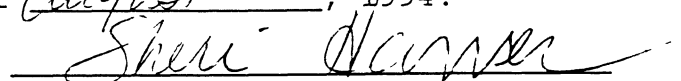
STATE OF UTAH,	:	MOTION TO WITHDRAW
	:	DEFENDANT'S GUILTY PLEA
Plaintiff,	:	
v.	:	
JOE RAKES,	:	Case No. 941900597FS
	:	JUDGE JOHN A. ROKICH
Defendant.	:	

COMES NOW the Defendant, JOE RAKES, by and through his attorney of record, JUDITH A. JENSEN, and hereby moves the Court to withdraw his guilty plea on the grounds that the plea was not entered knowingly, intelligently and voluntarily.

DATED this 18 day of August, 1994.


JUDITH A. JENSEN
Attorney for Defendant

MAILED/DELIVERED a copy of the foregoing to the Salt Lake County Attorney's Office, 231 East 400 South, Salt Lake City, Utah 84111 this 18 day of August, 1994.



APPENDIX "B"

DAVID E. YOCOM
Salt Lake County Attorney
ANN BOYDEN, 5043
Deputy County Attorney
231 East 400 South, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 363-7900

FILED DISTRICT COURT
Third Judicial District

SEP 21 1994

SALT LAKE COUNTY
By 11111111
Deputy Clerk

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

THE STATE OF UTAH,

Plaintiff,

-vs-

JOE RAKES,

Defendant.

)
) FINDINGS OF FACT, CONCLUSIONS OF
) LAW, AND ORDER DENYING
) DEFENDANT'S MOTION TO WITHDRAW
) GUILTY PLEA

)
) Case No. 941900597FS

)
) Judge John A. Rokich

On August 18, 1994, the defendant, through counsel Judith A. Jensen, moved the court to withdraw his guilty plea. Defendant had also entered a guilty plea in Case No. 941900595FS, and defense counsel said in a telephone conversation that their intent was to move to withdraw both pleas.

The matter was set for hearing on September 12, 1994. Defendant was present with counsel Judith A. Jensen, and Ann Boyden was present for the State.

Defense counsel asked the court to continue the hearing to give defendant time to do his own analysis of the controlled substance. The State responded that it objected to the motion to withdraw the plea and that the drug analysis was irrelevant to that motion.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DENYING DEFENDANT'S
MOTION TO WITHDRAW GUILTY PLEA

Case No. 941900597FS

Page 2

Also, the State had new concerns about further delay since the defendant was now out of custody and two new felony charges had been filed against defendant since his entry of guilty pleas in the above cases.

The defendant addressed the court personally concerning his guilty pleas.

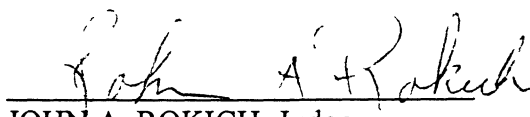
The court then found that the motion to withdraw the pleas was outside the 30-day period set forth in 77-13-6, U.C.A., and that the defendant was experienced sufficiently in the justice system to understand fully what he was doing when he entered his pleas.

The court further found that the defendant had knowingly entered the guilty pleas and no good cause had been shown to allow for their withdrawal.

The court therefore DENIED defendant's motion to withdraw the guilty pleas and ORDERED the defendant to be sentenced on the matters on September 29, 1994 at 1:30 P.M.

DATED this 16 day of September, 1994.

BY THE COURT:


JOHN A. ROKICH, Judge

Approved as to form:

Judith A. Jensen

00176

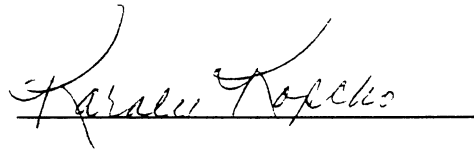
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DENYING DEFENDANT'S
MOTION TO WITHDRAW GUILTY PLEA

Case No. 941900597FS

Page 3

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing Findings Of Fact, Conclusions Of Law, And Order Denying Defendant's Motion To Withdraw Guilty Plea was delivered to Judith A. Jensen, Attorney for Defendant Joe Rakes, at 424 East 500 South, Suite 300, Salt Lake City, Utah 84111 on the 13 day of September, 1994.

A handwritten signature in cursive script, appearing to read "Karalee Kopke", is written over a horizontal line.

APPENDIX "C"

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

THE STATE OF UTAH,

Plaintiff,

vs.

Joe Rakes

Defendant.

JUDGMENT, SENTENCE
(COMMITMENT)

Case No. 941960597
Count No. _____
Honorable John A. Rokuchi
Clerk Tim Roberts
Reporter K. Schultz
Bailiff P. Phillips
Date Sept 19, 1994

☐ The motion of _____ to enter a judgment of conviction for the next lower category of offense and impose sentence accordingly is ☐ granted ☐ denied. There being no legal or other reason why sentence should not be imposed, and defendant having been convicted by ☐ a jury; ☐ the court; ☒ plea of guilty; ☐ plea of no contest; of the offense of AG 1st Degree Felony to Dist C/S, a felony of the 3rd degree, ☐ a class _____ misdemeanor, being now present in court and ready for sentence and represented by J. Jensen, and the State being represented by R. HANUP, is now adjudged guilty of the above offense, is now sentenced to a term in the Utah State Prison:

- ☐ to a maximum mandatory term of _____ years and which may be for life;
☒ not to exceed five years;
☐ of not less than one year nor more than fifteen years;
☐ of not less than five years and which may be for life;
☐ not to exceed _____ years;
☐ and ordered to pay a fine in the amount of \$ _____;
☐ and ordered to pay restitution in the amount of \$ _____ to _____

- ☒ such sentence is to run concurrently with Sentence on case 941960595
☐ such sentence is to run consecutively with _____
☐ upon motion of ☐ State, ☐ Defense, ☐ Court, Count(s) _____ are hereby dismissed.
☐ Defendant is granted a stay of the above (☐ prison) sentence and placed on probation in the custody of this Court and under the supervision of the Chief Agent, Utah State Department of Adult Parole for the period of _____, pursuant to the attached conditions of probation.
☐ Defendant is remanded into the custody of the Sheriff of Salt Lake County ☐ for delivery to the Utah State Prison, Draper, Utah, or ☐ for delivery to the Salt Lake County Jail, where defendant shall be confined and imprisoned in accordance with this Judgment and Commitment.
☒ Commitment shall issue forthwith

DATED this 19 day of Sept, 1994

APPROVED AS TO FORM:

John A. Rokuchi
DISTRICT COURT JUDGE

Defense Counsel

Deputy County Attorney

Page 1 of 1

APPENDIX "D"

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

THE STATE OF UTAH,

Plaintiff,

vs.

THE PAKES

Defendant.

JUDGMENT, SENTENCE
(COMMITMENT)

Case No. 94190595
Count No. _____
Honorable John A. Rokich
Clerk Jim Roberts
Reporter K. Schultz
Bailiff P. Phillips
Date Sept 19, 1994

☐ The motion of _____ to enter a judgment of conviction for the next lower category of offense and impose sentence accordingly is ☐ granted ☐ denied. There being no legal or other reason why sentence should not be imposed, and defendant having been convicted by ☐ a jury; ☐ the court; ☒ plea of guilty; ☐ plea of no contest; of the offense of after appeal to Dist a US, a felony of the 2nd degree, ☐ a class _____ misdemeanor, being now present in court and ready for sentence and represented by J. Jensen, and the State being represented by R. Hamp, is now adjudged guilty of the above offense, is now sentenced to a term in the Utah State Prison:

- ☐ to a maximum mandatory term of _____ years and which may be for life;
☐ not to exceed five years;
☒ of not less than one year nor more than fifteen years;
☐ of not less than five years and which may be for life;
☐ not to exceed _____ years;
☐ and ordered to pay a fine in the amount of \$ _____;
☐ and ordered to pay restitution in the amount of \$ _____ to _____

- ☒ such sentence is to run concurrently with Sentence in Case # 94190597
☐ such sentence is to run consecutively with _____
☐ upon motion of ☐ State, ☐ Defense, ☐ Court, Count(s) _____ are hereby dismissed.
☐ _____

- ☐ Defendant is granted a stay of the above (☐ prison) sentence and placed on probation in the custody of this Court and under the supervision of the Chief Agent, Utah State Department of Adult Parole for the period of _____, pursuant to the attached conditions of probation.
☐ Defendant is remanded into the custody of the Sheriff of Salt Lake County ☐ for delivery to the Utah State Prison, Draper, Utah, or ☐ for delivery to the Salt Lake County Jail, where defendant shall be confined and imprisoned in accordance with this Judgment and Commitment.
☒ Commitment shall issue forth with

DATED this 19 day of September, 1994

APPROVED AS TO FORM:

John A. Rokich
DISTRICT COURT JUDGE

Defense Counsel

Deputy County Attorney

00047

Page 1 of 1

APPENDIX "E"

MARY C. CORPORON #734
Attorney for Defendant
CORPORON & WILLIAMS, P.C.
310 South Main Street
Suite 1400
Salt Lake City, Utah 84101
(801) 328-1162

IN THE UTAH STATE COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

-vs-

JOE RAKES,

Defendant/Appellant.

AFFIDAVIT OF DEFENDANT/APPELLANT

Case No. 940624-CA

STATE OF UTAH)
 :SS
COUNTY OF SALT LAKE)

I, JOE RAKES, being first duly sworn upon oath, depose and state as follows:

1. I am the defendant to the above-entitled action and the appellant herein.

2. I was represented in the trial court in this matter by an attorney for the Legal Defender Association. I am now represented by a new attorney not in conflict with the Legal Defender Association.

3. I entered a plea of guilty in the trial court below.

Subsequently, I filed a motion to withdraw my plea of guilty.

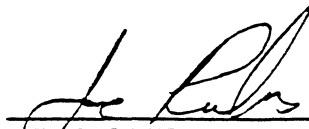
4. The elements in the statement I signed in court at the time I initially entered my plea were not correctly stated, and the crime to which I was entering a plea is not properly stated in that form.

5. I determined after I entered my plea in the trial court that I wanted to withdraw my plea of guilty, and I requested my attorney from the Legal Defenders Association to file a motion to withdraw my plea. This motion was not actually filed by my counsel until 31 days after the entry of the plea, past the time limit for filing a motion to withdraw my plea.

6. At the hearing in the trial court regarding my motion to withdraw my plea of guilty, the attorney representing me from the Legal Defenders Association, failed to argue to the court regarding the confusion in my statement at the time of plea regarding the elements of the offense, and the crime to which I was entering a plea.

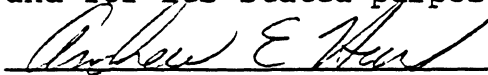
7. I did not have effective assistance of counsel in the trial court, because counsel failed properly to advise me at the time I entered my plea of guilty, counsel failed to make a motion to withdraw my plea of guilty in a timely manner, which the trial court found to be jurisdictional, and my counsel failed to make the arguments necessary at my motion to withdraw a plea of guilty, because counsel was then already in a conflict of interest, in that

counsel should have argued that the plea was not properly entered in the first place, due to the neglect of counsel.

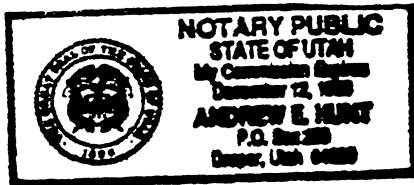


JOE RAKES
Defendant/Appellant

ON THE 31 day of May, 1995,
personally appeared before me, the undersigned notary, JOE RAKES,
the signer of the foregoing AFFIDAVIT, who duly acknowledged to me
that he signed the same voluntarily and for its stated purpose.



Notary Public

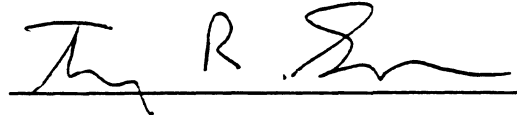


CERTIFICATE OF MAILING

I HEREBY CERTIFY that I am employed in the offices of Corporon & Williams, attorneys for the defendant herein, and that I caused the foregoing Affidavit, to be served upon plaintiff by mailing, postage prepaid, a true and correct copy of the same to:

JAN GRAHAM
Attorney General
Attorney for Plaintiff
236 State Capitol Building
Salt Lake City, Utah 84114

on the 31st day of May, 1995.



Secretary