

1995

# West Valley City vs. Jamie Hunsaker : Brief of Appellant

Utah Court of Appeals

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J. Richard Catten.

Tom Jones.

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IN THE UTAH COURT OF APPEALS

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WEST VALLEY CITY,	:	Case No. 950471-CA
	:	
Plaintiff-Appellee,	:	
	:	
vs.	:	
	:	
JAMIE HUNSAKER,	:	
	:	Argument Priority
Defendant-Appellant.	:	Classification Number Two (2)

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BRIEF OF APPELLANT

APPEAL FROM A JUDGMENT OF CONVICTION FOR THE  
OFFENSE OF D.U.I., A CLASS B MISDEMEANOR, IN  
VIOLATION OF UTAH CODE ANNOTATED 41-6-44,  
BEFORE THE THIRD JUDICIAL CIRCUIT COURT IN  
AND FOR SALT LAKE COUNTY, STATE OF UTAH, WEST  
VALLEY CITY DEPARTMENT, THE HONORABLE EDWARD  
A. WATSON, JUDGE, PRESIDING.

**UTAH COURT OF APPEALS  
BRIEF**

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DOCKET NO. 950471-CA

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**FILED**

OCT 30 1995

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Exh. indicates Exhibit  
Tr. indicates Transcript  
R. indicates Record

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BRIEF OF APPELLANT

JURISDICTION AND NATURE OF PROCEEDINGS

This is an Appeal from a Judgment and conviction for the offense of D.U.I., a Class B. Misdemeanor, in violation of Utah Code Annotated 41-6-44, before the Third Judicial Circuit Court in and for Salt Lake County, State of Utah, West Valley City Department, the Honorable Edward A. Watson, Judge, presiding. Utah Code Annotated 78-21-3(f) confers jurisdiction upon the Court of Appeals to hear this Appeal.

ARGUMENT PRIORITY CLASSIFICATION

The above captioned matter is an appeal from a judgment of conviction and sentence in a criminal matter wherein the death penalty was not imposed. Therefore, pursuant to the terms and provisions of Rule 29(b), Utah Rules of Appellate Procedure, it should be assigned an Argument Priority Classification Number of Two (2).

STATEMENT OF ISSUES

1. Whether the evidence presented at trial herein was legally sufficient to demonstrate the guilt of Defendant of the offense charged beyond a reasonable doubt.

2. Whether the arresting officer herein had legal authority and probable cause to stop and detain the Defendant for the purpose of investigating the offense herein charged.

3. Whether the Court improperly interposed itself into the plea bargaining process herein by precluding a negotiated disposition of this matter.

#### STATEMENT OF THE CASE

Defendant-Appellant, Jamie Hunsaker, was charged by Information in one (1) count before the Third Judicial Circuit Court, County of Salt Lake, West Valley City Department, State of Utah, the Honorable Edward A. Watson, Judge, presiding, with the offense of Driving Under the Influence of Alcohol, a Class "B" Misdemeanor in violation of Utah Code Annotated 41-6-44 (1989).

On June 7, 1995, Defendant-Appellant Hunsaker was convicted by the Court after non-jury trial herein, of the offense charged.

On July 26, 1995, the Honorable Edward A. Watson sentenced Defendant Hunsaker to five (5) days in the Salt Lake County Jail and a substantial fine in the premises.

At trial herein, the Defendant-Appellant argued that:

A. The evidence presented at trial herein was legally insufficient to demonstrate the guilt of Defendant of the offense charged beyond a reasonable doubt.

B. The arresting officer herein did not have legal authority and probable cause to stop and detain the Defendant for the purpose of investigating the offense herein charged.

C. The Court improperly interposed itself into the plea



bargaining process herein by precluding a negotiated disposition of this matter.

On July 26, 1995, the Honorable Edward A. Watson, upon petition therefor, issued a Certificate of Probable Cause herein, staying execution of the within sentence until this Honorable Court has occasion to review the within and below matters.

#### CONSTITUTIONAL AND STATUTORY PROVISIONS

An interpretation of the following and below-cited Constitutional provisions, Statutes, and Rules is determinative of the issues herein presented:

##### Constitutional Provisions

Amendment IV, United States Constitution..

Article I, Section 14, Utah State Constitution.

##### Statutes

Utah Code Annotated 41-6-44.

Utah Code Annotated 77-7-2.

Utah Code Annotated 77-7-15.

##### Rules

Rule 11, Utah Rules of Criminal Procedure.

As required by the terms and provisions of Rule 24(1)(b) and Rule 24(f), Utah Rules of Appellate Procedure, the within Constitutional Provisions, Statutes, and Rules are herein reproduced and incorporated into the Addendum hereto.

#### STATEMENT OF THE FACTS

Defendant-Appellant, Jamie Hunsaker, was charged by Information in one (1) Count before the Third Judicial Circuit

Court, County of Salt Lake, West Valley City Department, State of Utah, Honorable Edward A. Watson, Judge, presiding, with the offense of D.U.I., a Class "B" misdemeanor in violation of Utah Code Annotated 41-6-44 (1994). (R.1, Tr.4).

On June 7, 1995, Defendant-Appellant Hunsaker was convicted by the Court after non-jury trial herein, of the offense charged.

Prior to trial herein, and specifically on January 27, 1995, April 19, 1995 and June 7, 1995, the City of West Valley and counsel for Defendant repeatedly petitioned and moved the Trial Court herein to permit amendment of the charges against Defendant-Appellant to permit summary disposition of this case by plea arrangement. Those efforts on the part of counsel were repeatedly and steadfastly rebuffed by the Trial Court, and the matter thereupon proceeded to trial (Tr. 5-8, 4-19-95) (Tr. 5-8, 6-7-95).

At trial herein, the City of West Valley elicited evidence from the arresting officer, one Travis Pearce, that he had been approached by "bouncers" at the parking lot of a well-known West Valley drinking establishment and asked to detain a group of people getting into a Ford Bronco who reportedly had been involved in an altercation inside that establishment. Upon receiving such information, Officer Pearce stopped the vehicle and detained the driver, Defendant-Appellant Hunsaker. Officer Pearce testified that he stopped the vehicle specifically at the request of the "bouncers," having himself observed no inappropriate conduct or violations of law (Tr. 11-15, Tr. 17-22)

At this juncture, West Valley City Police Officer Corey

Newbold arrived upon the scene to assist Officer Pearce. Officer Newbold testified that, upon detecting the odor of alcohol on Defendant-Appellant's person, he administered two "field tests" to Defendant-Appellant, the results of which, in his judgment, demonstrated that the Defendant-Appellant was impaired. (Tr. 24-40, Tr. 68-77).

• Officer Newbold further testified that he administered a chemical test to Defendant-Appellant, specifically a Breathalyzer Test. The results of that test were properly excluded from evidence by the Trial Court. (Tr. 48-67).

Defendant-Appellant Hunsaker testified that he had consumed only a small amount of alcohol on the evening in question, that he was in no wise impaired and that the "field tests" relied upon by the City herein were administered under the most adverse of conditions. (Tr. 90-123).

Mr. Hunsaker's wife, April Hunsaker, testified that she picked up her husband at the West Valley City Police Department shortly after his arrest herein, that he appeared to be "normal" at such time and that he evidenced no unusual conduct or impairment when she saw him. (Tr. 124-135).

At trial herein, and at the subsequent sentencing proceedings had on July 26, 1995, the Defendant-Appellant argued:

A. The evidence presented at trial herein was legally insufficient to demonstrate the guilt of Defendant of the offense charged beyond a reasonable doubt.

B. The arresting officer herein did not have legal

authority and probable cause to stop and detain the Defendant for the purpose of investigating the offense herein charged.

C. The Court improperly interposed itself into the plea bargaining process herein by precluding a negotiated disposition of this matter.

The above arguments notwithstanding, on June 7, 1995, Defendant-Appellant was adjudged Guilty herein, and on July 26, 1995, he was sentenced to five (5) days in the Salt Lake County Jail and to a substantial fine in the premises.

On July 26, 1995, the Honorable Edward A. Watson, upon petition therefor, issued a Certificate of Probable Cause herein, staying execution of the within sentence until this Honorable Court could review this matter.

#### SUMMARY OF ARGUMENT

The Trial Court erred in concluding that the evidence presented herein was sufficient to demonstrate the guilt of Defendant beyond a reasonable doubt. In addition, the Trial Court erred in concluding that the arresting officer herein had legal authority to stop, detain and arrest Defendant. Finally, the Trial Court erred in improperly insinuating and interposing itself into the plea bargaining process herein. This Court should reverse the verdict and judgment of the Trial Court and remand this matter with directions that the Trial Court enter a verdict of acquittal herein.

#### ARGUMENT

##### POINT I

THE EVIDENCE HEREIN PRESENTED WAS LEGALLY  
INSUFFICIENT TO DEMONSTRATE THE GUILT OF  
DEFENDANT BEYOND A REASONABLE DOUBT.

It is well established as a matter of law that the evidence presented upon trial in a criminal case must be sufficient to demonstrate the guilt of the accused beyond all reasonable doubt. State v. John, 586 P.2d 410 (Utah S. Ct., 1978); State v. Granato, 610 P.2d 1290 (Utah S. Ct., 1980).

An appellate Court, in reviewing the sufficiency of the evidence, on the above standard, to demonstrate the guilt of the accused, must determine whether the verdict is supported by substantial evidence and whether a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt, or whether the evidence was so insubstantial or inconclusive that reasonable minds must have entertained a reasonable doubt that Defendant committed the crime charged. State v. Dyer, 671 P.2d 142 (Utah S. Ct., 1983); Walker v. Board of Pardons, 803 P.2d 1241 (Utah S. Ct., 1990); State v. Hamilton, 827 P.2d 232 (Utah S. Ct., 1992); 5 Am. Jur. 2d, Appellate Review, Sections 663-667.

5 Am. Jur. 2d, Appellate Review, Section 664 succinctly enunciates the rule as follows:

On review of the sufficiency of the evidence to support a criminal conviction, the critical inquiry is whether the evidence can reasonably support a finding of guilt beyond a reasonable doubt. The fact finder retains the function of weighing the evidence, and the appellate inquiry is not whether the appellate Court itself believes that the evidence at trial established guilt beyond a reasonable doubt. The verdict must be sustained if there

is substantial evidence to support it. In other words, the appellate Court must consider whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (Ibid)

In State v. Dyer, supra, the Utah Supreme Court states the rule as follows:

Defendant's final contention is that the evidence was insufficient to sustain his conviction. To prevail on this contention, defendant must show that the evidence was so insubstantial or inconclusive that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime charged. (Ibid at 148-149)

In State v. Hamilton, the Court stated:

We review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict. We reverse a conviction for insufficient evidence only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted. (Ibid at 236)

Applying the above cited cases and authority to the facts in the instant case, it is abundantly clear that the evidence herein presented was insufficient to demonstrate defendant's guilt beyond a reasonable doubt.

At trial herein, the City of West Valley elicited evidence from the arresting officer, one Travis Pearce, that he had been approached by a "bouncer" at the parking lot of a well-known West Valley drinking establishment and asked to detain a group of people getting into a Ford Bronco who reportedly had been involved in an altercation inside that establishment. Upon receiving such

information, Officer Pearce stopped the vehicle and detained the driver, Defendant-Appellant Hunsaker. Officer Pearce testified that he stopped the vehicle specifically at the request of the "bouncers," having himself observed no inappropriate conduct or violations of law.

At this juncture, West Valley City Police Officer Corey Newbold arrived upon the scene to assist Officer Pearce. Officer Newbold testified that, upon detecting the odor of alcohol on Defendant-Appellant's person, he administered two "field tests" to Defendant-Appellant, the results of which, in his opinion and judgment, demonstrated that the Defendant-Appellant was impaired.

Officer Newbold further testified that he administered a chemical test to Defendant-Appellant, specifically a Breathalyzer Test. The results of that test were excluded from evidence by the Trial Court.

Defendant-Appellant Hunsaker testified that he had consumed only a small amount of alcohol on the evening in question, that he was in no wise impaired and that the "field tests" relied upon by the City herein were administered under the most adverse of conditions:

"The difficulty was is I was wearing boots.

It was not raining, it was snowing, very cold outside. I had a T-shirt on, I was shaking.

I had over three, four different flashlights in my face."

(Tr. 100)

Mr. Hunsaker's wife, April Hunsaker, testified that she picked up her husband at the West Valley City Police Department shortly after his arrest herein, that he appeared to be "normal" at such time and that he evidenced no unusual conduct or impairment when she saw him.

From the above, it should be readily apparent that the only evidence against Defendant in the instant case consists in:

1. Testimony by the arresting officer that he detected the odor of alcohol on Defendant's person.

2. Testimony by the arresting officer as to the performance of Defendant on two "field tests" administered upon Defendant in extremely adverse circumstances.

3. Opinion testimony by the arresting officer, in part based upon the performance of Defendant on the field tests, that in his judgment Defendant was impaired.

Contra this evidence, Defendant presented testimony that the "field tests" were performed as well as might be expected under the extremely adverse circumstances, that the Defendant only consumed a small amount of alcohol and that both Defendant and his wife were of the opinion that Defendant was "normal" and manifested no outward indications of impairment.

From the above, it should be readily apparent that the state of the evidence in this case is such that, even given the allowances and inferences the law reasonably allows, a reasonable person must and should conclude that the evidence herein is inherently inconclusive and improbable, and, indeed, that a



reasonable doubt exists. The case, as previously noted, is built on an insubstantial foundation. Certainly the odor of alcohol, by itself, would not be enough. Certainly the performance by Defendant on one field test (the second was a "Gaze Nystagmus" test) would not be enough under the extremely adverse circumstances of the test. Certainly the opinion of the officer, based in part on performance of that test and the odor of alcohol, would not be enough. Lumping all three together, can this Court reasonably conclude that the evidence herein satisfies the standard of the within cited cases? No. This Court should reverse the verdict and judgment of the Trial Court and remand this matter with instructions to the Trial Court to enter a verdict and judgment of acquittal herein.

#### POINT II

THE ARRESTING OFFICER HEREIN DID NOT HAVE  
LEGAL AUTHORITY AND PROBABLE CAUSE TO STOP AND  
DETAIN THE DEFENDANT PRECEDENT TO ARREST.

Amendment IV to the Constitution of the United States provides, in pertinent part:

The right of the people to be secure in  
their persons, houses, papers, and effects,  
against unreasonable searches and seizures,  
shall not be violated . . . .

Article I, Section 14, of the Constitution of the State of Utah provides, identically, in pertinent part:

The right of the people to be secure in  
their persons, houses, papers and effect,  
against unreasonable searches and seizures,  
shall not be violated . . . .

Utah Code Annotated 77-7-2 provides:

A peace officer may make an arrest . . .  
without warrant:

. . .

(3) when he has reasonable cause to believe  
the person has committed a public offense.

. . .

In addition, Utah Code Annotated 77-7-15 provides:

A peace officer may stop any person in a  
public place when he has a reasonable  
suspicion to believe he has committed or is in  
the act of committing or is attempting to  
commit a public offense and may demand his  
name, address and an explanation of his  
actions.

It is well established as a matter of law that the stopping of  
a motor vehicle and the detention of its occupants constitutes a  
seizure within the meaning of Article I, Section 14 of the Utah  
Constitution and the Fourth Amendment to the Constitution of the  
United States. Terry v. Ohio, 392 U.S. 1, (U.S. Supreme Ct.,  
1968); State v. Case, 884 P.2d 1274 (Utah Ct. App., 1994); State v.  
Contrel, 886 P.2d 107 (Utah Ct. App., 1994). It is further well  
established that such stops are justified only if there is a  
reasonable suspicion that a person or persons is involved in  
criminal activity, and that reasonable suspicion must be based upon  
and supported by "specific and articulable facts." State v. Menke,  
787 P.2d 537 (Utah Ct. App., 1993); State v. Potter, 863 P.2d 40  
(Utah Ct. App. 1993); State v. Roth, 827 P.2d 255 (Utah Ct. App.,  
1992); State v. Case, Ibid. If such specific and articulable facts  
are not based upon an arresting officer's own observations and  
inferences, it has been held by this and other Courts that the  
legality of the stop will depend upon the sufficiency of the

articulable facts known to the individual originating the information received and acted upon by the investigating officer. State v. Case, Ibid; United States v. Hensley, 469 U.S. 221 (U.S. Supreme Ct., 1985).

In State v. Case, supra, a case which appears to be "on all fours", as it were, with the instant case, this Court said:

. . . If the investigating officer cannot provide independent or corroborating information through his or her own observations, the legality of a stop based on information imparted by another will depend on the sufficiency of the articulable facts known to the individual originating the information . . . subsequently received and acted upon by the investigating officer. (Ibid at 1277)

Applying the above cited cases and authority to the facts in the instant case, it is clear that the arresting officer herein did not himself have legal authority and probable cause to stop and detain the Defendant precedent to his arrest and that the City of West Valley failed to demonstrate, from the evidence, that the "originating party," so to speak, had the required "articulable facts" to justify the stop herein.

At trial herein, the City of West Valley elicited testimony from the arresting officer, one Travis Pearce, that he had been approached by a "bouncer" at the parking lot of a well-known West Valley drinking establishment and asked to detain a group of people getting into a Ford Bronco who reportedly had been involved in an altercation inside that establishment. The source of the bouncer's information appears to have been a radio communication from an unknown party inside the tavern, although this was never clearly

established upon the record. At any rate, the bouncer himself was apparently not the original source since the record shows that he had been outside in the parking lot for at least fifteen (15) minutes. (Tr. 17-22) The bouncer was never called as a witness herein nor was the original source of his information ever identified nor, importantly, did the arresting officer or any officer ever investigate the supposed and reported incident further. What is clear is that, upon receipt of the request from the bouncer, Officer Pearce stopped and detained Defendant Hunsaker. Officer Pearce specifically stated that the stop was made only upon request of the bouncer and that he himself observed no inappropriate conduct or violations of law.

It is readily apparent from the above that the officer who stopped and detained Defendant's vehicle herein did not have the required articulable reasonable grounds, under the above cited cases and authority, to stop and detain Defendant. The officer had observed no crime, had observed no violations of the law, whether traffic or more substantial, and had observed no "driving pattern." He was simply acting in direct response to a request by an unknown third party, how many times removed God only knows, to detain the Hunsaker party. The "bouncer" himself was never identified, let alone produced, by the City. The reporting party who, presumably by radio, contacted the police officer who then stopped and detained Defendant, was never identified, let alone produced as a witness. Indeed, since no further investigation of the purported incident was had, it should not be surprising that no witnesses

were produced.

Thus, in the instant case, the sufficiency of the articulable facts known to the individual originating the request that Defendant be stopped and detained must be and cannot be provided. It cannot be provided because neither the "bouncer" nor the person or persons however many times removed who "originated" the information acted upon were called as witnesses herein. Accordingly, the Trial Court erred in ruling that the stop and detention of Defendant in this case was constitutionally permissible.

### POINT III

THE TRIAL COURT IMPROPERLY INTERPOSED ITSELF  
INTO THE PLEA BARGAINING PROCESS BY PRECLUDING  
A NEGOTIATED DISPOSITION OF THIS MATTER.

Prior to trial herein, and specifically on January 27, 1995, April 19, 1995 and June 7, 1995, the City of West Valley and counsel for Defendant repeatedly petitioned and moved the Trial Court herein to permit amendment of the charges against Defendant-Appellant to allow summary disposition of this case by plea arrangement. Those efforts on the part of counsel were repeatedly and steadfastly rebuffed by the Trial Court, and the matter thereupon proceeded to trial.

It should be readily apparent that the actions of the Trial Court in improperly interposing itself into the plea bargaining process herein, and in precluding, by judicial fiat, the repeated attempts by the prosecution to compromise this case by negotiation, were improper, ill advised and a clear abuse of judicial discretion

and authority warranting reversal and remand of this matter for the purpose of effectuating the mutually agreed upon plea arrangement.

Rule 11, Utah Rules of Criminal Procedure, provides in pertinent part:

(g)(1) If it appears that the prosecuting attorney or any other party has agreed to request or recommend the acceptance of a plea to a lesser included offense, or the dismissal of other charges, the agreement shall be approved by the court.

. . . .

(h)(2) When a tentative plea agreement has been reached, the judge, upon request of the parties, may permit the disclosure of the tentative agreement and the reasons for it, in advance of the time for tender of the plea. The judge may then indicate to the prosecuting attorney and defense counsel whether the proposed disposition will be approved.

Rule 11 appears to confer upon the Trial Court the discretion to "approve" proffered plea arrangements. How, why and to what extent that includes the corresponding power to "disapprove" of such proffered plea arrangements is the subject that we ask this Court to now address. How, why and under what circumstances is it a reasonable exercise of the Court's discretion to refuse such plea arrangements? Finally, did the Trial Court herein abuse its discretionary powers in refusing to accept the plea arrangement agreed upon herein?

It appears to be well established as a matter of law that a trial judge is generally under no duty to accept a negotiated settlement of a case, nor is he bound by any agreement between the parties, and that the acceptance of a plea of guilty to a lesser

offense included in the offense charged is generally a matter addressed to the sound discretion of the Court. 21 Am. Jur. 2d, Criminal Law, Sections 484, 488; State v. Williams, 341 So. 2d 370 (Louis. S. Ct., 1976); State v. Adams, 342 So. 2d 818 (Florida S. Ct., 1977); People v. West, 477 P.2d 409 (Cal. S. Ct., 1970); Frady v. People, 40 P.2d 606 (Colo. S. Ct., 1934).

21 Am. Jur. 2d, Criminal Law, Sections 484, 486, state succinctly the black letter law herein:

The trial judge is under no duty, statutory or otherwise, to accept a negotiated plea of guilty, nor is he bound by the agreement between the prosecution and the defendant. On the other hand, the trial judge may, after inquiring into the circumstances of the plea to determine whether it was voluntary and knowing, accept the plea as entered, unless the result of the plea would be contrary to statute, or circumvent the sentencing discretion of the trial judge.

. . .

It has been said that the acceptance of a plea of guilty to a lesser offense included in the offense charged rests in the discretion of the court. (Ibid at 484, 488)

Thus it is well established that the question of the acceptance or rejection of a proffered plea arrangement is one that is addressed to the sound discretion of the Trial Court. But what exactly does that mean? And, specifically, what does it mean in our governmental system of shared powers and "checks and balances"? And why, exactly, did the Trial Court abuse its discretion in the instant case?

In this case, the Trial Court's rejection of the plea arrangement was an abuse of discretion because it was steadfastly

unreasonable and because it deprived the prosecution of the ability to compromise a weak case to effectuate the ends of justice. Further, it undercut the discretionary powers which the prosecutor, as a member of the Executive branch of government, possesses, and should be permitted to exercise without judicial interference where it is reasonable to do so. But, more importantly, the Trial Court's refusal of the plea bargain herein was an abuse of discretion because once all of the uncontroverted and uncontested good and substantial reasons for the plea bargain were communicated to the Court, the Court still steadfastly and unreasonably refused, without any legitimate basis, to permit the bargain.

It should be noted that the repeated efforts on the part of the prosecution to compromise this case did not proceed merely from an abundance of charity and fellow feeling. This was and is a weak case. There was and is a problem here with respect to probable cause for the stop. There was, as demonstrated clearly by a later ruling of the Court, an anticipatable problem here with respect to the receipt in evidence of the chemical test. There were problems with the untoward circumstances of the giving of the "field tests". There was an anticipatable problem with respect to conflicts among witnesses as to whether or not Defendant showed demonstrable signs of impairment. In short, this was and is the very sort of case that normally is compromised by plea agreement. Only, in this case, the Court, by judicial fiat, precluded such compromise.

Now this is not to suggest that the judiciary does not have some supervisory duties to perform in the area of accepting or



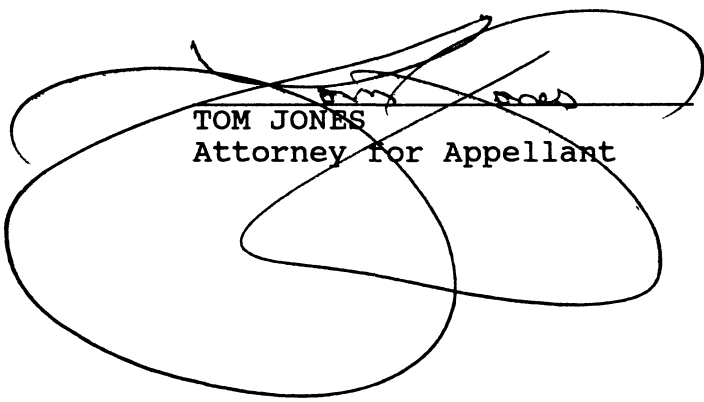
rejecting proffered plea arrangements. But the Trial Court should not be permitted to act as a "super-prosecutor" in the premises, usurping the legitimate decision making powers of the Executive branch of government at will. And, whenever that Executive branch of government seeks to exercise its discretionary powers vis a vis a plea arrangement, the Courts, as part of our system of reasonable checks and balances, ought only to be able to "check" that exercise of discretionary prosecutorial power, in situations where the Executive is unable to articulate on the record reasonable grounds for its actions. This, we opine, is and ought to be what is contemplated by Rule 11 of our Rules of Criminal Procedure. This is and ought to be the parameters of "sound Judicial discretion" in a Rule 11 plea bargaining situation. We urge, indeed importune the Court to so rule.

#### CONCLUSION

The Trial Court erred in concluding that the evidence presented herein was sufficient to demonstrate the guilt of Defendant beyond a reasonable doubt. In addition, the Trial Court erred in concluding that the arresting officer herein had legal authority to stop, detain and arrest Defendant. Finally, the Trial Court erred in improperly insinuating and interposing itself into the plea-bargaining process herein.

This Court should reverse the judgment of conviction and sentence herein entered by the Trial Court and remand this matter with directions that the Trial Court order a verdict of acquittal herein.


DATED this 30<sup>th</sup> day of October, 1995.



TOM JONES  
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 30<sup>th</sup> day of October, 1995, I personally hand-delivered four (4) true and correct copies of the above and foregoing Brief of Appellant to the Office of J. Richard Catten, Esq., Assistant West Valley City Attorney, Attorney for Appellee, 3636 Constitution Boulevard, West Valley City, Utah 84119.

  
TOM JONES  
Attorney for Appellant

## **ADDENDUM**

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COVER PAGE A:

INFORMATION HEREIN FILED

Keith L. Stoney (3868)  
David L. Clark (6199)  
Valerie J. O'Brien (6624)  
City Prosecutor  
West Valley City  
3600 Constitution Boulevard  
West Valley City, UT 84119  
(801) 963-3344

YR:  
4-19  
9:00  
E.A.W.

IN THE THIRD CIRCUIT COURT, STATE OF UTAH  
SALT LAKE COUNTY, WEST VALLEY DEPARTMENT

STATE OF UTAH (WVC)

Plaintiff,

V.

HUNSAKER, JAMIE DANIEL  
1256 WAXWING  
WVC, UTAH 84123  
11/25/72

Defendant.

# INFORMATION

Case No. 945015055

The undersigned, **VALERIE J. O'BRIEN**, under oath, states on information and belief that the defendant, on or about 4 DECEMBER, 1994, at the vicinity of 3370 SOUTH 1700 WEST, West Valley City, Utah, did unlawfully commit the crime(s) of:

COUNT 1: DUI, a Class "B" Misdemeanor, 41-6-44, U.C.A. 1953, as amended, by driving or being in actual physical control of a vehicle while having a blood or breath alcohol content of .08% or greater by weight or while under the influence of alcohol or drugs.

This information is based on evidence obtained from the following witnesses:

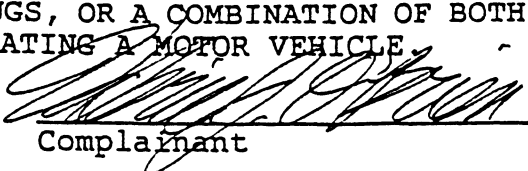
OFFICER NEWBOLD  
OFFICER T. PEARCE

**PROBABLE CAUSE STATEMENT:**

Your affiant bases this information on the following:

OFFICER STATED THAT THE DEFENDANT OPERATED A MOTOR VEHICLE UNDER

THE INFLUENCE OF ALCOHOL, DRUGS, OR A COMBINATION OF BOTH RENDERING  
HIM INCAPABLE OF SAFELY OPERATING A MOTOR VEHICLE.

  
Complainant

94-64107, MG/CP, HUNSAKER.JD1  
PTC: 27 JANUARY, 1995, 9:00 A.M.  
March 14, 1995



COVER PAGE B:

ORDER OF JUDGMENT OF CONVICTION AND SENTENCE

FILED  
WEST VALLEY DEPT.

JUL 26 1995

Clerk of the Circuit Court  
By [Signature] Deputy

THIRD CIRCUIT COURT - WVC  
SALT LAKE COUNTY, STATE OF UTAH

CITY OF WEST VALLEY CITY  
VS

JUDGMENT, SENTENCE  
(COMMITMENT)

HUNSAKER, JAMIE DANIEL  
1256 WAXWING  
WEST VALLEY CITY UT 84123

CASE NO: 945015055  
DOB: 11/25/72  
TAPE: COUNT:  
DATE: 07/26/95  
CITATION: ,

THE ABOVE NAMED DEFENDANT BEING ADJUDGED GUILTY FOR THE  
OFFENSE(S) AS FOLLOWS:

Charge: 41-6-44 DRIVING UNDER THE INFLUENCE OF ALC/DRUGS  
Plea: Find: Guilty - Bench  
Fine: 1387.50 Susp: 0.00  
Jail: 90 DA Susp: 80 DA ACS: 0

FEEES AND ASSESSMENTS:

Fine Description: FINE -PROSECUTOR SPL			
Credit: 0.00	Paid: 0.00	Due: 750.00	
Fine Description: SURCHARGE - 85%			
Credit: 0.00	Paid: 0.00	Due: 637.50	
TOTAL FINES AND ASSESMENTS:			
Credit: 0.00	Paid: 0.00	Due: 1,387.50	

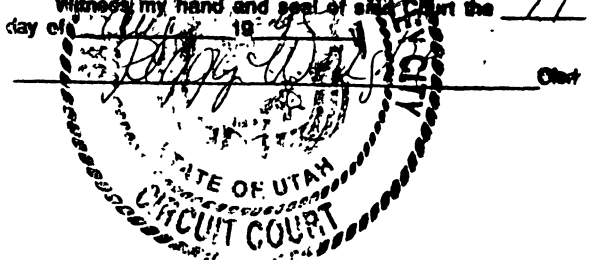
TRACKING:

Fine Stay	04/26/96
Probation (Other)	07/26/96

CALENDAR:

SENTENCING 07/26/95 10:30 AM in rm 1 with EDWARD A. WATSON

STATE OF UTAH  
COUNTY OF SALT LAKE  
I, the undersigned, Clerk of the Third Circuit Court, State  
of Utah, Salt Lake County, West Valley Department do hereby  
certify that the amended and foregoing is a true and full copy  
of an original document on file in my office as such clerk.  
Witness my hand and seal of said Court the 17  
day of July 1995



DOCKET INFORMATION:Sentence:

Deft present with Counsel, Prosecutor not present

ATD: JONES, TOM

Tape: 13206 Count: 124

Judge: EDWARD A. WATSON

Chrg: DUI

Plea:

Find: Guilty - Be

Fine Amount: 1387.50 Suspended: .00

Jail: 90 DAYS Suspended: 80 DAYS

Fines and assessments entered: FN 750.00

SB 637.50

Total fines and assessments... 1387.50

DEF WAS PLACED ON PROBATION WITH ACEC FOR 12 MONTHS WITH THE FOLLOWING CONDITIONS: SERVE 5 DAYS IN JAIL. REPORT ON 7-28-95 AT 6 P.M. PERFORM 120 HOURS COMMUNITY SERVICE IN LIEU OF AN ADDITIONAL 5 DAYS JAIL. DO NOT CONSUME OR POSSESS ALCOHOL. COMPLETE LEVELS 1 AND 2 DUI CLASSES AT ACEC. COMPLETE ANY OTHER TREATMENT DEEMED NECESSARY. VIOLATE NO LAWS. PAY FINE WITHIN 9 MONTHS. ON SUCCESSFUL COMPLETION OF PROBATION, THE BALANCE OF THE JAIL WILL BE SUSPENDED.

BY THE COURT

JUDGE CIRCUIT COURT

NOTE: APPEAL MUST BE FILED WITHIN 30 DAYS  
OF ENTRY OF THIS JUDGMENT.

STATE OF UTAH  
COUNTY OF SALT LAKE

I, the undersigned, Clerk of the Third Circuit Court, State of Utah, Salt Lake County, West Valley Department, do hereby certify that the attached and foregoing is a true and full copy of an original document on file in my office as such Clerk.

Witness my hand and seal of said Court the  
19

OF UTAH  
CIRCUIT COURT

COVER PAGE C:

FULL TEXT OF DISPOSITIVE CONSTITUTIONAL  
PROVISIONS HEREIN CITED

CHARLES COTESWORTH  
PINCKNEY,  
CHARLES PINCKNEY,  
PIERCE BUTLER.

Georgia

WILLIAM FEW,  
ABR BALDWIN.

In Convention Monday September 17th 1787.

**Present The States of**

New Hampshire, Massachusetts, Connecticut, Mr. Hamilton from New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia. Resolved,

That the preceding Constitution be laid before the United States in Congress assembled, and that it is the Opinion of this Convention, that it should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the Recommendation of its Legislature, for their Assent and Ratification; and that each Convention assenting to, and ratifying the Same, should give Notice thereof to the United States in Congress assembled.

Resolved, That it is the Opinion of this Convention, that as soon as the Conventions of nine States shall have ratified this Constitution, the United States in Congress assembled should fix a Day on which Electors should be appointed by the States which shall have ratified the same, and a day on which the Electors should assemble to vote for the President, and the Time and Place for commencing Proceedings under this Constitution. That after such Publication the Electors, should be appointed, and the Senators and Representatives elected: That the Electors should meet on the Day fixed for the Election of the President, and should transmit their Votes certified, signed, sealed and directed, as the Constitution requires, to the Secretary of the United States in Congress assembled, that the Senators and Representatives should convene at the Time and Place assigned; that the Senators should appoint a President of the Senate, for the sole Purpose of receiving, opening and counting the Votes for President; and, that after he shall be chosen, the Congress, together with the President, should, without Delay, proceed to execute this Constitution.

By the Unanimous Order of the Convention.  
Go. WASHINGTON, Presidt. W. JACKSON, Secretary

**AMENDMENTS TO THE  
CONSTITUTION OF THE UNITED  
STATES**

**AMENDMENTS I-X (BILL OF RIGHTS)  
AMENDMENTS XI-XXVII**

**AMENDMENT I**

**[Religious and political freedom.]**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**AMENDMENT II**

**[Right to bear arms.]**

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed

**AMENDMENT III**

**[Quartering soldiers.]**

No Soldier shall, in time of peace, be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

**AMENDMENT IV**

**[Unreasonable searches and seizures.]**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

**AMENDMENT V**

**[Criminal actions — Provisions concerning — Due process of law and just compensation clauses.]**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**AMENDMENT VI**

**[Rights of accused.]**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence.

**AMENDMENT VII**

**[Trial by jury in civil cases.]**

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

**AMENDMENT VIII**

**[Bail — Punishment.]**

substantial evidence to support the charge and the court finds by clear and convincing evidence that the person would constitute a substantial danger to any other person or to the community or is likely to flee the jurisdiction of the court if released on bail.

(2) Persons convicted of a crime are bailable pending appeal only as prescribed by law. 1988 (2nd S.S.)

**Sec. 9. [Excessive bail and fines — Cruel punishments.]**

Excessive bail shall not be required; excessive fines shall not be imposed; nor shall cruel and unusual punishments be inflicted. Persons arrested or imprisoned shall not be treated with unnecessary rigor. 1896

**Sec. 10. [Trial by jury.]**

In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded. 1896

**Sec. 11. [Courts open — Redress of injuries.]**

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party. 1896

**Sec. 12. [Rights of accused persons.]**

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule. 1994

**Sec. 13. [Prosecution by information or indictment — Grand jury.]**

Offenses heretofore required to be prosecuted by indictment, shall be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by the accused with the consent of the State, or by indictment, with or without such examination and commitment. The formation of the grand jury and the powers and duties thereof shall be as prescribed by the Legislature. 1847

**Sec. 14. [Unreasonable searches forbidden — Issuance of warrant.]**

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures

shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized. 1896

**Sec. 15. [Freedom of speech and of the press — Libel.]**

No law shall be passed to abridge or restrain the freedom of speech or of the press. In all criminal prosecutions for libel the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact. 1896

**Sec. 16. [No imprisonment for debt — Exception.]**

There shall be no imprisonment for debt except in cases of absconding debtors. 1896

**Sec. 17. [Elections to be free — Soldiers voting.]**

All elections shall be free, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage. Soldiers, in time of war, may vote at their post of duty, in or out of the State, under regulations to be prescribed by law. 1896

**Sec. 18. [Attainder — Ex post facto laws — Impairing contracts.]**

No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be passed. 1896

**Sec. 19. [Treason defined — Proof.]**

Treason against the State shall consist only in levying war against it, or in adhering to its enemies or in giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act. 1896

**Sec. 20. [Military subordinate to the civil power.]**

The military shall be in strict subordination to the civil power, and no soldier in time of peace, shall be quartered in any house without the consent of the owner; nor in time of war except in a manner to be prescribed by law. 1896

**Sec. 21. [Slavery forbidden.]**

Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within this State. 1896

**Sec. 22. [Private property for public use.]**

Private property shall not be taken or damaged for public use without just compensation. 1896

**Sec. 23. [Irrevocable franchises forbidden.]**

No law shall be passed granting irrevocably any franchise, privilege or immunity. 1896

**Sec. 24. [Uniform operation of laws.]**

All laws of a general nature shall have uniform operation. 1896

**Sec. 25. [Rights retained by people.]**

This enumeration of rights shall not be construed to impair or deny others retained by the people. 1896

**Sec. 26. [Provisions mandatory and prohibitory.]**

The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise. 1896

**Sec. 27. [Fundamental rights.]**

Frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government. 1896

COVER PAGE D:

FULL TEXT OF DISPOSITIVE STATUTES  
AND RULES HEREIN CITED

**41-6-41. Statistical information regarding accidents — Annual publication.**

The department shall tabulate and may analyze all accident reports and shall publish annually, or at more frequent intervals, related statistical information as to the number and circumstances of traffic accidents. 1987

**41-6-42. Local powers to require report.**

A local authority may by ordinance require that the operator of a vehicle involved in any accident, or the owner of the vehicle, also file with the designated municipal department a written report of the accident or a copy of any report required under this article to be filed with the department on accidents occurring within its jurisdiction. All reports are for the confidential use of the municipal department and are subject to Section 41-6-40. 1987

**ARTICLE 5****DRIVING WHILE INTOXICATED AND RECKLESS DRIVING****41-6-43. Local DUI and related ordinances and reckless driving ordinances — Consistent with code.**

(1) An ordinance adopted by a local authority that governs a person's operating or being in actual physical control of a motor vehicle while having alcohol in the blood or while under the influence of alcohol or any drug or the combined influence of alcohol and any drug, or that governs, in relation to any of those matters, the use of a chemical test or chemical tests, or evidentiary presumptions, or penalties, or that governs any combination of those matters, shall be consistent with the provisions in this code which govern those matters.

(2) An ordinance adopted by a local authority that governs reckless driving, or operating a vehicle in willful or wanton disregard for the safety of persons or property shall be consistent with the provisions of this code which govern those matters. 1987

**41-6-43.10. Repealed.**

1985

**41-6-44. Driving under the influence of alcohol, drugs, or with specified or unsafe blood alcohol concentration — Measurement of blood or breath alcohol — Criminal punishment — Arrest without warrant — Penalties — Suspension or revocation of license — Penalties.**

(1) (a) A person may not operate or be in actual physical control of a vehicle within this state if the person:

(i) has a blood or breath alcohol concentration of .08 grams or greater as shown by a chemical test given within two hours after the alleged operation or physical control; or

(ii) is under the influence of alcohol, any drug, or the combined influence of alcohol and any drug to a degree that renders the person incapable of safely operating a vehicle.

(b) The fact that a person charged with violating this section is or has been legally entitled to use alcohol or a drug is not a defense against any charge of violating this section.

(2) Alcohol concentration in the blood shall be based upon grams of alcohol per 100 milliliters of blood, and alcohol concentration in the breath shall be based upon grams of alcohol per 210 liters of breath.

(3) (a) A person convicted the first or second time of a violation of Subsection (1) is guilty of a:

(i) class B misdemeanor; or

(ii) class A misdemeanor if the person:

(A) has also inflicted bodily injury upon another as a proximate result of having operated the vehicle in a negligent manner; or

(B) had a passenger under 16 years of age in the vehicle at the time of the offense.

(b) In this section, the standard of negligence is that of simple negligence, the failure to exercise that degree of care that an ordinarily reasonable and prudent person exercises under like or similar circumstances.

(c) In this section, a reference to this section includes any similar local ordinance adopted in compliance with Section 41-6-43.

(4) (a) As part of any sentence imposed the court shall, upon a first conviction, impose a mandatory jail sentence of not less than 48 consecutive hours nor more than 240 hours.

(b) The court may, as an alternative to jail, require the person to work in a community-service work program for not less than 24 hours nor more than 50 hours.

(c) (i) In addition to the jail sentence or community-service work program, the court shall order the person to participate in an assessment and educational series at a licensed alcohol or drug dependency rehabilitation facility, as appropriate.

(ii) For a violation committed after July 1, 1993, the court may order the person to obtain treatment at an alcohol or drug dependency rehabilitation facility if the licensed alcohol or drug dependency rehabilitation facility determines that the person has a problem condition involving alcohol or drugs.

(5) (a) Upon a second conviction for a violation committed within six years of a prior violation under this section the court shall as part of any sentence impose a mandatory jail sentence of not less than 240 consecutive hours nor more than 720 hours.

(b) The court may, as an alternative to jail, require the person to work in a community-service work program for not less than 80 hours nor more than 240 hours.

(c) In addition to the jail sentence or community-service work program, the court shall order the person to participate in an assessment and educational series at a licensed alcohol or drug dependency rehabilitation facility, as appropriate. The court may, in its discretion, order the person to obtain treatment at an alcohol or drug dependency rehabilitation facility.

(6) (a) A third conviction for a violation committed within six years of two prior violations under this section is a:

(i) class B misdemeanor except as provided in Subsections (ii) and (7); and

(ii) class A misdemeanor if both of the prior convictions are for violations committed after April 23, 1990.

(b) (i) Under Subsection (a)(i) the court shall as part of any sentence impose a mandatory jail sentence of not less than 720 nor more than 2,160 hours.

(ii) The court may, as an alternative to jail, require the person to work in a community-service work program for not less than 240 nor more than 720 hours.

(iii) In addition to the jail sentence or community-service work program, the court shall order the person to obtain treatment at an alcohol or drug dependency rehabilitation facility, as appropriate.

(c) (i) Under Subsection (a)(ii) the court shall as part of any sentence impose a fine of not less than \$1,000 and impose a mandatory jail sentence of not less than 720 hours nor more than 2,160 hours.

(ii) The court may, as an alternative to jail, require the person to work in a community-service work



program for not less than 240 nor more than 720 hours, but only if the court enters in writing on the record the reason it finds the defendant should not serve the jail sentence. Enrollment in and completion of an alcohol or drug dependency rehabilitation program approved by the court may be a sentencing alternative to incarceration or community service if the program provides intensive care or inpatient treatment and long-term closely supervised follow through after the treatment.

(iii) In addition to the jail sentence or community-service work program, the court shall order the person to obtain treatment at an alcohol or drug dependency rehabilitation facility.

- (7) (a) A fourth or subsequent conviction for a violation committed within six years of the prior violations under this section is a third degree felony if at least three prior convictions are for violations committed after April 23, 1990.

(b) The court shall as part of any sentence impose a fine of not less than \$1,000 and impose a mandatory jail sentence of not less than 720 hours nor more than 2,160 hours.

(c) (i) The court may, as an alternative to jail, require the person to work in a community-service work program for not less than 240 nor more than 720 hours, but only if the court enters in writing on the record the reason it finds the defendant should not serve the jail sentence.

(ii) Enrollment in and completion of an alcohol or drug dependency rehabilitation program approved by the court may be a sentencing alternative to incarceration or community service if the program provides intensive care or inpatient treatment and long-term closely supervised follow through after the treatment.

(d) In addition to the jail sentence or community-service work program, the court shall order the person to obtain treatment at an alcohol or drug dependency rehabilitation facility.

- (8) (a) The mandatory portion of any sentence required under this section may not be suspended and the convicted person is not eligible for parole or probation until any sentence imposed under this section has been served. Probation or parole resulting from a conviction for a violation under this section may not be terminated.

(b) The department may not reinstate any license suspended or revoked as a result of the conviction under this section, until the convicted person has furnished evidence satisfactory to the department that:

(i) all required alcohol or drug dependency assessment, education, treatment, and rehabilitation ordered for a violation committed after July 1, 1993, have been completed;

(ii) all fines and fees including fees for restitution and rehabilitation costs assessed against the person have been paid, if the conviction is a second or subsequent conviction for a violation committed within six years of a prior violation; and

(iii) the person does not use drugs in any abusive or illegal manner as certified by a licensed alcohol or drug dependency rehabilitation facility, if the conviction is for a third or subsequent conviction for a violation committed within six years of two prior violations committed after July 1, 1993.

- (9) (a) (i) The provisions in Subsections (4), (5), (6), and (7) that require a sentencing court to order a convicted person to: participate in an assessment and educational series at a licensed alcohol or drug dependency

rehabilitation facility; obtain, in the discretion of the court, treatment at an alcohol or drug dependency rehabilitation facility; obtain, mandatorily, treatment at an alcohol or drug dependency rehabilitation facility; or do any combination of those things, apply to a conviction for a violation of Section 41-6-45 that qualifies as a prior conviction under Subsection (10).

(ii) The court shall render the same order regarding education or treatment at an alcohol or drug dependency rehabilitation facility, or both, in connection with a first, second, or subsequent conviction under Section 41-6-45 that qualifies as a prior conviction under Subsection (10), as the court would render in connection with applying respectively, the first, second, or subsequent conviction requirements of Subsections (4), (5), (6), and (7).

(b) For purposes of determining whether a conviction under Section 41-6-45 that qualified as a prior conviction under Subsection (10), is a first, second, or subsequent conviction under this subsection, a previous conviction under either this section or Section 41-6-45 is considered a prior conviction.

(c) Any alcohol or drug dependency rehabilitation program and any community-based or other education program provided for in this section shall be approved by the Department of Human Services.

- (10) (a) (i) When the prosecution agrees to a plea of guilty or no contest to a charge of a violation of Section 41-6-45 or of an ordinance enacted under Section 41-6-43 in satisfaction of, or as a substitute for, an original charge of a violation of this section, the prosecution shall state for the record a factual basis for the plea, including whether or not there had been consumption of alcohol, drugs, or a combination of both, by the defendant in connection with the violation.

(ii) The statement is an offer of proof of the facts that shows whether there was consumption of alcohol, drugs, or a combination of both, by the defendant, in connection with the violation.

- (b) (i) The court shall advise the defendant before accepting the plea offered under this subsection of the consequences of a violation of Section 41-6-45 as follows.

(ii) If the court accepts the defendant's plea of guilty or no contest to a charge of violating Section 41-6-45, and the prosecutor states for the record that there was consumption of alcohol, drugs, or a combination of both, by the defendant in connection with the violation, the resulting conviction is a prior conviction for the purposes of Subsections (5), (6), and (7).

(c) The court shall notify the department of each conviction of Section 41-6-45 that is a prior offense for the purposes of Subsections (5), (6), and (7).

- (11) A peace officer may, without a warrant, arrest a person for a violation of this section when the officer has probable cause to believe the violation has occurred, although not in his presence, and if the officer has probable cause to believe that the violation was committed by the person.

- (12) (a) The Department of Public Safety shall:

(i) suspend for 90 days the operator's license of a person convicted for the first time under Subsection (1); and

(ii) revoke for one year the license of a person convicted of any subsequent offense under Subsection (1) if the violation is committed within a period of six years from the date of the prior violation.

(b) The department shall subtract from any suspension or revocation period the number of days for which a license was previously suspended under Section 53-3-223, if the previous suspension was based on the same occurrence upon which the record of conviction is based. 1994

#### 41-6-44.1. Procedures — Adjudicative proceedings.

The Department of Public Safety shall comply with the procedures and requirements of Title 63, Chapter 46b, in its adjudicative proceedings. 1987

#### 41-6-44.2. Repealed.

1983

#### 41-6-44.3. Standards for chemical breath analysis — Evidence.

(1) The commissioner of the Department of Public Safety shall establish standards for the administration and interpretation of chemical analysis of a person's breath, including standards of training.

(2) In any action or proceeding in which it is material to prove that a person was operating or in actual physical control of a vehicle while under the influence of alcohol or any drug or operating with a blood or breath alcohol content statutorily prohibited, documents offered as memoranda or records of acts, conditions, or events to prove that the analysis was made and the instrument used was accurate, according to standards established in Subsection (1), are admissible if:

(a) the judge finds that they were made in the regular course of the investigation at or about the time of the act, condition, or event; and

(b) the source of information from which made and the method and circumstances of their preparation indicate their trustworthiness.

(3) If the judge finds that the standards established under Subsection (1) and the conditions of Subsection (2) have been met, there is a presumption that the test results are valid and further foundation for introduction of the evidence is unnecessary. 1987

#### 41-6-44.4. Person under 21 may not operate vehicle with detectable alcohol in body — Chemical test procedures — Temporary license — Hearing and decision — Suspension of license or operating privilege — Fees — Judicial review.

(1) (a) As used in this section "local substance abuse authority" has the same meaning as provided in Section 62A-8-101.

(b) Calculations of blood, breath, or urine alcohol concentration under this section shall be made in accordance with the procedures in Subsection 41-6-44(2).

(2) (a) A person younger than 21 years of age may not operate or be in actual physical control of a vehicle with any measurable blood, breath, or urine alcohol concentration in his body as shown by a chemical test.

(b) (i) A person with a valid operator license who violates Subsection (a), in addition to any other applicable penalties arising out of the incident, shall have his operator license denied or suspended as provided in Subsection (ii).

(ii) (A) For a first offense under Subsection (a), the Driver License Division of the Department of Public Safety shall deny the person's operator license if ordered or not challenged under this section for a period of 90 days beginning on the 30th day after the date of the arrest under Section 32A-12-209.

(B) For a second or subsequent offense under Subsection (a), within three years of a prior denial or suspension, the Driver License Division shall suspend the person's operator license for a

period of one year beginning on the 30th day after the date of arrest.

(c) (i) A person who has not been issued an operator license who violates Subsection (a), in addition to any other penalties arising out of the incident, shall be punished as provided in Subsection (ii).

(ii) For one year or until he is 17, whichever is longer, a person may not operate a vehicle and the Driver License Division may not issue the person an operator license or learner's permit.

(3) (a) When a peace officer has reasonable grounds to believe that a person may be violating or has violated Subsection (2), the peace officer may, in connection with arresting the person for a violation of Section 32A-12-209, request that the person submit to a chemical test or tests to be administered in compliance with the standards under Section 41-6-44.10.

(b) The peace officer shall advise a person prior to the person's submission to a chemical test that a test result indicating a violation of Subsection (2)(a) will result in denial or suspension of the person's license to operate a motor vehicle or a refusal to issue a license.

(c) If the person submits to a chemical test and the test results indicate a blood, breath, or urine alcohol content in violation of Subsection (2)(a), or if the officer makes a determination, based on reasonable grounds, that the person is otherwise in violation of Subsection (2)(a), the officer directing administration of the test or making the determination shall serve on the person, on behalf of the Driver License Division, immediate notice of the Driver License Division's intention to deny or suspend the person's license to operate a vehicle or refusal to issue a license under Subsection (2).

(4) When the officer serves immediate notice on behalf of the Driver License Division, he shall:

(a) take the Utah license certificate or permit, if any, of the operator;

(b) issue a temporary license certificate effective for only 29 days if the driver had a valid operator's license; and

(c) supply to the operator, on a form to be approved by the Driver License Division, basic information regarding how to obtain a prompt hearing before the Driver License Division.

(5) A citation issued by the officer may, if approved as to form by the Driver License Division, serve also as the temporary license certificate under Subsection (4)(b).

(6) The peace officer serving the notice shall send to the Driver License Division within five days after the date of arrest and service of the notice:

(a) the person's driver license certificate, if any;

(b) a copy of the citation issued for the offense;

(c) a signed report on a form approved by the Driver License Division indicating the chemical test results, if any; and

(d) any other basis for the officer's determination that the person has violated Subsection (2).

(7) (a) (i) Upon written request, the Driver License Division shall grant to the person an opportunity to be heard within 29 days after the date of arrest under Section 32A-12-209.

(ii) The request shall be made within ten days of the date of the arrest.

(b) A hearing, if held, shall be before the Driver License Division in the county in which the arrest occurred, unless the Driver License Division and the person agree that the hearing may be held in some other county.

(c) The hearing shall be documented and shall cover the issues of:

- Section**  
**77-7-16.** Authority of peace officer to frisk suspect for dangerous weapon — Grounds.  
**77-7-17.** Authority of peace officer to take possession of weapons.  
**77-7-18.** Citation on misdemeanor or infraction charge.  
**77-7-19.** Appearance required by citation — Arrest for failure to appear — Transfer of cases — Motor vehicle violations — Disposition of fines and costs.  
**77-7-20.** Service of citation on defendant — Filing in court — Contents of citations.  
**77-7-21.** Proceeding on citation — Voluntary forfeiture of bail — Parent signature required — Information, when required.  
**77-7-22.** Failure to appear as misdemeanor.  
**77-7-23.** Delivery of prisoner arrested without warrant to magistrate — Transfer to court with jurisdiction — Violation as misdemeanor.

**77-7-1. "Arrest" defined — Restraint allowed.**

An arrest is an actual restraint of the person arrested or submission to custody. The person shall not be subjected to any more restraint than is necessary for his arrest and detention. 1990

**77-7-2. By peace officers.**

A peace officer may make an arrest under authority of a warrant or may, without warrant, arrest a person:

- (1) for any public offense committed or attempted in the presence of any peace officer; "presence" includes all of the physical senses or any device that enhances the acuity, sensitivity, or range of any physical sense, or records the observations of any of the physical senses;
- (2) when he has reasonable cause to believe a felony has been committed and has reasonable cause to believe that the person arrested has committed it;
- (3) when he has reasonable cause to believe the person has committed a public offense, and there is reasonable cause for believing the person may:
  - (a) flee or conceal himself to avoid arrest;
  - (b) destroy or conceal evidence of the commission of the offense; or
  - (c) injure another person or damage property belonging to another person. 1996

**77-7-3. By private persons.**

A private person may arrest another:

- (1) For a public offense committed or attempted in his presence; or
- (2) When a felony has been committed and he has reasonable cause to believe the person arrested has committed it. 1990

**77-7-4. Magistrate may orally order arrest.**

A magistrate may orally require a peace officer to arrest anyone committing or attempting to commit a public offense in the presence of the magistrate, and, in the case of an emergency, when probable cause exists, a magistrate may orally authorize a peace officer to arrest a person for a public offense, and thereafter, as soon as practical, an information shall be filed against the person arrested. 1990

**77-7-5. Issuance of warrant — Time and place arrests may be made — Contents of warrant — Responsibility for transporting prisoners — Court clerk to dispense restitution for transportation.**

- (1) A magistrate may issue a warrant for arrest upon finding probable cause to believe that the person to be arrested has committed a public offense. If the offense charged is:

(a) a felony, the arrest upon a warrant may be made at any time of the day or night; or

(b) a misdemeanor, the arrest upon a warrant can be made at night only if:

- (i) the magistrate has endorsed authorization to do so on the warrant;
  - (ii) the person to be arrested is upon a public highway, in a public place, or in a place open to or accessible to the public; or
  - (iii) the person to be arrested is encountered by a peace officer in the regular course of that peace officer's investigation of a criminal offense unrelated to the misdemeanor warrant for arrest.
- (2) (a) If the magistrate determines that the accused must appear in court, the magistrate shall include in the arrest warrant the name of the law enforcement agency in the county or municipality with jurisdiction over the offense charged.

(b) (i) The law enforcement agency identified by the magistrate under Subsection (a) is responsible for providing inter-county transportation of the defendant, if necessary, from the arresting law enforcement agency to the court site.

(ii) The law enforcement agency named on the warrant may contract with another law enforcement agency to have a defendant transported.

(c) (i) The law enforcement agency identified by the magistrate under Subsection (a) as responsible for transporting the defendant shall provide to the court clerk of the court in which the defendant is tried, an affidavit stating that the defendant was transported, indicating the law enforcement agency responsible for the transportation, and stating the number of miles the defendant was transported.

(ii) The court clerk shall account for restitution paid under Section 76-3-201 for governmental transportation expenses and disburse restitution monies collected by the court to the law enforcement agency responsible for the transportation of a convicted defendant. 1993

**77-7-5.5. Repealed.**

**1991**

**77-7-6. Manner of making arrest.**

(1) The person making the arrest shall inform the person being arrested of his intention, cause, and authority to arrest him. Such notice shall not be required when:

- (a) there is reason to believe the notice will endanger the life or safety of the officer or another person or will likely enable the party being arrested to escape;
- (b) the person being arrested is actually engaged in the commission of, or an attempt to commit, an offense; or
- (c) the person being arrested is pursued immediately after the commission of an offense or an escape.

(2) (a) If a hearing-impaired person, as defined in Subsection 78-24a-1(2), is arrested for an alleged violation of a criminal law, including a local ordinance, the arresting officer shall assess the communicative abilities of the hearing-impaired person and conduct this notification, and any further notifications of rights, warnings, interrogations, or taking of statements, in a manner that accurately and effectively communicates with the hearing-impaired person including qualified interpreters, lip reading, pen and paper, typewriters, computers with print-out capability, and telecommunications devices for the deaf.

(b) Compliance with this subsection is a factor to be considered by any court when evaluating whether statements of a hearing-impaired person were made knowingly, voluntarily, and intelligently. 1995

**77-7-7. Force in making arrest.**

If a person is being arrested and flees or forcibly resists after being informed of the intention to make the arrest, the person arresting may use reasonable force to effect the arrest. Deadly force may be used only as provided in Section 76-2-404. 1980

**77-7-8. Doors and windows may be broken, when.**

To make an arrest, a private person, if the offense is a felony, and in all cases, a peace officer, may break the door or window of the building in which the person to be arrested is, or in which there are reasonable grounds for believing him to be. Before making the break, the person shall demand admission and explain the purpose for which admission is desired. Demand and explanation need not be given before breaking under the exceptions in Section 77-7-6 or where there is reason to believe evidence will be secreted or destroyed. 1980

**77-7-9. Weapons may be taken from prisoner.**

Any person making an arrest may seize from the person arrested all weapons which he may have on or about his person. 1980

**77-7-10. Telegraph or telephone authorization of execution of arrest warrant.**

Any magistrate may, by an endorsement on a warrant of arrest, authorize by telegraph, telephone or other reasonable means, its execution. A copy of the warrant or notice of its issuance and terms may be sent to one or more peace officers. The copy or notice communicated authorizes the officer to proceed in the same manner under it as if he had an original warrant. 1980

**77-7-11. Possession of warrant by arresting officer not required.**

Any peace officer who has knowledge of an outstanding warrant of arrest may arrest a person he reasonably believes to be the person described in the warrant, without the peace officer having physical possession of the warrant. 1980

**77-7-12. Detaining persons suspected of shoplifting or library theft — Persons authorized.**

(1) A peace officer, merchant, or merchant's employee, servant, or agent who has reasonable grounds to believe that goods held or displayed for sale by the merchant have been taken by a person with intent to steal may, for the purpose of investigating the unlawful act and attempting to effect a recovery of the goods, detain the person in a reasonable manner for a reasonable length of time.

(2) A peace officer or employee of a library may detain a person for the purposes and under the limits of Subsection (1) if there are reasonable grounds to believe the person violated Title 76, Chapter 6, Part 8, Library Theft. 1987

**77-7-13. Arrest without warrant by peace officer — Reasonable grounds, what constitutes — Exemption from civil or criminal liability.**

(1) A peace officer may arrest, without warrant, any person he has reasonable ground to believe has committed a theft under Title 76, Chapter 6, Part 8, Library Theft, or of goods held or displayed for sale.

(2) A charge of theft made to a peace officer under Part 8, Library Theft, by an employee of a library, or by a merchant, merchant's employee, servant, or agent constitutes a reasonable ground for arrest, and the police officer is relieved from any civil or criminal liability. 1987

**77-7-14. Person causing detention or arrest of person suspected of shoplifting or library theft — Civil and criminal immunity.**

(1) A peace officer, merchant, or merchant's employee, servant, or agent who causes the detention of a person as provided in Section 77-7-12, or who causes the arrest of a

person for theft of goods held or displayed for sale, is not criminally or civilly liable where he has reasonable and probable cause to believe the person detained or arrested committed a theft of goods held or displayed for sale.

(2) A peace officer or employee of a library who causes a detention or arrest of a person under Title 76, Chapter 6, Part 8, Library Theft, is not criminally or civilly liable where he has reasonable and probable cause to believe that the person committed a theft of library materials. 1987

**77-7-15. Authority of peace officer to stop and question suspect — Grounds.**

A peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation of his actions. 1980

**77-7-16. Authority of peace officer to frisk suspect for dangerous weapon — Grounds.**

A peace officer who has stopped a person temporarily for questioning may frisk the person for a dangerous weapon if he reasonably believes he or any other person is in danger. 1980

**77-7-17. Authority of peace officer to take possession of weapons.**

A peace officer who finds a dangerous weapon pursuant to a frisk may take and keep it until the completion of the questioning, at which time he shall either return it if lawfully possessed, or arrest such person. 1980

**77-7-18. Citation on misdemeanor or infraction charge.**

A peace officer, in lieu of taking a person into custody, any public official of any county or municipality charged with the enforcement of the law, a port-of-entry agent as defined in Section 27-12-2, and a volunteer authorized to issue a citation under Section 41-1a-414 may issue and deliver a citation requiring any person subject to arrest or prosecution on a misdemeanor or infraction charge to appear at the court of the magistrate before whom the person should be taken pursuant to law if the person had been arrested. 1994

**77-7-19. Appearance required by citation — Arrest for failure to appear — Transfer of cases — Motor vehicle violations — Disposition of fines and costs.**

(1) Persons receiving misdemeanor citations shall appear before the magistrate designated in the citation on or before the time and date specified in the citation unless the uniform bail schedule adopted by the Judicial Council or Subsection 77-7-21(1) permits forfeiture of bail for the offense charged.

(2) A citation may not require a person to appear sooner than five days or later than 14 days following its issuance.

(3) A person who receives a citation and who fails to comply with Section 77-7-21 on or before the time and date and at the court specified is subject to arrest. The magistrate may issue a warrant of arrest.

(4) Except where otherwise provided by law, a citation or information issued for violations of Title 41 shall state that the person receiving the citation or information shall appear before the magistrate who has jurisdiction over the offense charged.

(5) Any justice court judge may, upon the motion of either the defense attorney or prosecuting attorney, based on a lack of territorial jurisdiction or the disqualification of the judge, transfer cases to the nearest justice court or the nearest circuit court within the county.

(6) (a) Clerks and other administrative personnel serving the district, circuit, juvenile, and justice courts shall ensure that all citations for violation of Title 41 are filed in

found proficient to represent on appeal persons sentenced to death, the combined experience of the appointed attorneys must meet the following requirements:

- (1) at least one attorney must have served as counsel in at least three felony appeals; and
- (2) at least one attorney must have attended and completed within the past five years an approved continuing legal education course which deals, in substantial part, with the trial or appeal of death penalty cases.
- (d) Mere noncompliance with this rule or failure to follow the guidelines set forth in this rule shall not of itself be grounds for establishing that appointed counsel ineffectively represented the defendant at trial or on appeal.
- (e) Costs and attorneys' fees for appointed counsel shall be paid as described in Chapter 32 of Title 77.  
(Amended effective May 1, 1993.)

#### **Rule 9. Repealed.**

#### **Rule 9.5. Charged multiple offenses — To be filed in single court.**

- (1) (a) Unless otherwise provided by law, complaints, citations, or informations charging multiple offenses, which may include violations of state laws, county ordinances, or municipal ordinances and arising from a single criminal episode as defined by Section 76-1-401, shall be filed in a single court that has jurisdiction of the charged offense with the highest possible penalty of all the offenses charged.
- (b) The offenses within the complaint, citation, or information may not be separated except by order of the court and for good cause shown.
- (2) For purposes of this section, the court that is adjudicating the complaint, citation, or information has jurisdiction over all the offenses charged, and a single prosecutorial entity shall prosecute the offenses.

#### **Rule 10. Arraignment.**

- (a) Upon the return of an indictment or upon receipt of the records from the magistrate following a bind-over, the defendant shall forthwith be arraigned in the district court. Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to him the substance of the charge and calling on him to plead thereto. He shall be given a copy of the indictment or information before he is called upon to plead.
- (b) If upon arraignment the defendant requests additional time in which to plead or otherwise respond, a reasonable time may be granted.
- (c) Any defect or irregularity in or want or absence of any proceeding provided for by statute or these rules prior to arraignment shall be specifically and expressly objected to before a plea of guilty is entered or the same is waived.
- (d) If a defendant has been released on bail, or on his own recognizance, prior to arraignment and thereafter fails to appear for arraignment or trial when required to do so, a warrant of arrest may issue and bail may be forfeited.

#### **Rule 11. Pleas.**

- (a) Upon arraignment, except for an infraction, a defendant shall be represented by counsel, unless the defendant waives counsel in open court. The defendant shall not be required to plead until the defendant has had a reasonable time to confer with counsel.
- (b) A defendant may plead not guilty, guilty, no contest, not guilty by reason of insanity, or guilty and mentally ill pursuant to Rule 21.5. A defendant may plead in the alternative not guilty or not guilty by reason of insanity. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(c) A defendant may plead no contest only with the consent of the court.

(d) When a defendant enters a plea of not guilty, the case shall forthwith be set for trial. A defendant unable to make bail shall be given a preference for an early trial. In cases other than felonies the court shall advise the defendant, or counsel, of the requirements for making a written demand for a jury trial.

(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) 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;
- (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.

(f) Failure to advise the defendant of the time limits for filing any motion to withdraw a plea of guilty, no contest or guilty and mentally ill is not a ground for setting the plea aside, but may be the ground for extending the time to make a motion under Section 77-13-6.

(g) (1) If it appears that the prosecuting attorney or any other party has agreed to request or recommend the acceptance of a plea to a lesser included offense, or the dismissal of other charges, the agreement shall be approved by the court.

(2) If sentencing recommendations are allowed by the court, the court shall advise the defendant personally that any recommendation as to sentence is not binding on the court.

(h) (1) The judge shall not participate in plea discussions prior to any plea agreement being made by the prosecuting attorney.

(2) When a tentative plea agreement has been reached, the judge, upon request of the parties, may permit the disclosure of the tentative agreement and the reasons for it, in advance of the time for tender of the plea. The judge may then indicate to the prosecuting attorney and defense counsel whether the proposed disposition will be approved.

(3) If the judge then decides that final disposition should not be in conformity with the plea agreement, the judge shall advise the defendant and then call upon the defendant to either affirm or withdraw the plea.

(i) With approval of the court and the consent of the prosecution, a defendant may enter a conditional plea of guilty, guilty and mentally ill, or no contest, reserving in the record the right, on appeal from the judgment, to a review of the adverse determination of any specified pre-trial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

(Amended effective May 1, 1993.)

#### Rule 12. Motions.

(a) An application to the court for an order shall be by motion. A motion other than one made during a trial or hearing shall be in writing unless the court otherwise permits. It shall state with particularity the grounds upon which it is made and shall set forth the relief sought. It may be supported by affidavit or by evidence.

(b) Any defense, objection or request, including request for rulings on the admissibility of evidence, which is capable of determination without the trial of the general issue may be raised prior to trial by written motion. The following shall be raised at least five days prior to the trial:

- (1) defenses and objections based on defects in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense, which objection shall be noticed by the court at any time during the pendency of the proceeding;
- (2) motions concerning the admissibility of evidence;
- (3) requests for discovery where allowed;
- (4) requests for severance of charges or defendants under Rule 9; or
- (5) motions to dismiss on the ground of double jeopardy.

(c) A motion made before trial shall be determined before trial unless the court for good cause orders that the ruling be deferred for later determination. Where factual issues are involved in determining a motion, the court shall state its findings on the record.

(d) Failure of the defendant to timely raise defenses or objections or to make requests which must be made prior to trial or at the time set by the court shall constitute waiver thereof, but the court for cause shown may grant relief from such waiver.

(e) Except in justices' courts, a verbatim record shall be made of all proceedings at the hearing on motions, including such findings of fact and conclusions of law as are made orally.

(f) If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that bail be continued for a reasonable and specified time pending the filing of a new indictment or information. Nothing in this rule shall be deemed to affect provisions of law relating to a statute of limitations.

#### Rule 13. Pretrial conference.

(a) The trial court, in its discretion, may hold a pretrial conference, with trial counsel present, to consider such matters as will promote a fair and expeditious trial. The accused shall be present unless he waives his right to appear.

(b) At the conclusion of the conference, a pretrial order shall set out the matters ruled upon. Any stipulations made shall be signed by counsel, approved by the court and filed, and shall be binding upon the parties at trial, on appeal, and in postconviction proceedings unless set aside or modified by the court.

#### Rule 14. Subpoena.

(a) A subpoena to require the attendance of a witness or interpreter before a court, magistrate or grand jury in connection with a criminal investigation or prosecution may be issued by the magistrate with whom an information is filed, the county attorney on his own initiative or upon the direction of the grand jury, or the court in which an information or

indictment is to be tried. The clerk of the court in which a case is pending shall issue in blank to the defendant, without charge, as many signed subpoenas as the defendant may require.

(b) A subpoena may command the person to whom it is directed to appear and testify or to produce in court or to allow inspection of records, papers or other objects. The court may quash or modify the subpoena if compliance would be unreasonable.

(c) A subpoena may be served by any person over the age of 18 years who is not a party. Service shall be made by delivering a copy of the subpoena to the witness or interpreter personally and notifying him of the contents. A peace officer shall serve any subpoena delivered to him for service in his county.

(d) Written return of service of a subpoena shall be made promptly to the court and to the person requesting that the subpoena be served, stating the time and place of service and by whom service was made.

(e) A subpoena may compel the attendance of a witness from anywhere in the state.

(f) When a person required as a witness is in custody within the state, the court may order the officer having custody of the witness to bring him before the court.

(g) Failure to obey a subpoena without reasonable excuse may be deemed a contempt of the court responsible for its issuance.

(h) Whenever a material witness is about to leave the state, or is so ill or infirm as to afford reasonable grounds for believing that he will be unable to attend a trial or hearing, either party may, upon notice to the other, apply to the court for an order that the witness be examined conditionally by deposition. Attendance of the witness at the deposition may be compelled by subpoena. The defendant shall be present at the deposition and the court shall make whatever order is necessary to effect such attendance.

#### Rule 15. Expert witnesses and interpreters.

(a) The court may appoint any expert witness agreed upon by the parties or of its own selection. An expert so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed. An expert so appointed shall advise the court and the parties of his findings and may thereafter be called to testify by the court or by any party. He shall be subject to cross-examination by each party. The court shall determine the reasonable compensation of the expert and direct payment thereof. The parties may call expert witnesses of their own at their own expense. Upon showing that a defendant is financially unable to pay the fees of an expert whose services are necessary for adequate defense, the witness fee shall be paid as if he were called on behalf of the prosecution.

(b) The court may appoint an interpreter of its own selection and shall determine reasonable compensation and direct payment thereof. The court may allow counsel to question the interpreter before he is sworn to discharge the duties of an interpreter.

#### Rule 15.5. Visual recording of statement or testimony of child victim or witness of sexual or physical abuse — Conditions of admissibility.

(1) In any case concerning a charge of child abuse or of a sexual offense against a child, the oral statement of a victim or witness younger than 14 years of age may be recorded prior to the filing of an information or indictment, and upon motion and for good cause shown is admissible as evidence in any court proceeding regarding the offense if all of the following conditions are met:

- (a) no attorney for either party is in the child's presence when the statement is recorded;