2006

State of Utah v. Darrell Bunker : Brief of Appellant

Utah Court of Appeals

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THE COURT OF APPEALS
STATE OF UTAH

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STATE OF UTAH,	)	
	)	
Appellee/Plaintiff,	)	**APPELLANT'S BRIEF**
	)	
vs.	)	
	)	
DARRELL BUNKER,	)	APPELLATE No.: 20060857-CA
	)	
Appellant/Defendant.	)	

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THIS IS AN APPEAL FROM A CRIMINAL CONVICTION ENTERED IN THE FOURTH JUDICIAL DISTRICT COURT FOR UTAH COUNTY, STATE OF UTAH. THE HONORABLE SAMUEL MCVEY, TRIAL JUDGE.

PRIORITY NO. 2

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TABLE OF CONTENTS

TABLE OF AUTHORITIES
STATUTORY OR CONSTITUTIONAL LAW
DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES

U.C.A. 77-13-6.Withdrawal of plea.

(1) A plea of not guilty may be withdrawn at any time prior to conviction.

(2)(a) A plea of guilty or no contest may be withdrawn only upon leave of the court and a showing that it was not knowingly and voluntarily made.

(b) A request to withdraw a plea of guilty or no contest, except for a plea held in abeyance, shall be made by motion before sentence is announced. Sentence may not be announced unless the motion is denied. For a plea held in abeyance, a motion to withdraw the plea shall be made within 30 days of pleading guilty or no contest.

(c) Any challenge to a guilty plea not made within the time period specified in Subsection (2)(b) shall be pursued under Title 78, Chapter 35a, Post-Conviction Remedies Act, and Rule 65C, Utah Rules of Civil Procedure.

Rule 11(e), Utah Rules of Criminal Procedure.

(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:

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

desire counsel;

(e)(2) the plea is voluntarily made;

(e)(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;

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

(e)(4)(B) there is a factual basis for the plea. A factual basis is sufficient if it establishes that the charged crime was actually committed by the defendant or, if the defendant refuses or is otherwise unable to admit culpability, that the prosecution has sufficient evidence to establish a substantial risk of conviction;

(e)(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;

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

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

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

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

TABLE OF CASES AND AUTHORITIES

JURISDICTION OF APPELLATE COURT

Authority for said appeal is found within the confine of Rule 26 of the Utah Rules of Criminal Procedure; Utah State Constitution Article 1, Section 12; Utah Code Annotated Section 77-1 6(g); and Section 78-2-2 (i) Utah Code Annotated.

STATEMENT OF ISSUE

Defendant entered a plea to the charge of 'burglary', a third degree felony. Prior to sentencing, the defendant filed a motion to withdraw his plea asserting his innocence to the charge and asserting that his conduct, if illegal, was a violation of the trespassing statute not the burglary statute.

Defendant asserts that he was not fully advised how the trespassing statute more appropriately proscribed his conduct as opposed to the burglary statute.

The Court denied the motion to withdraw the plea and sentenced the defendant based on the plea of guilty to the 'burglary' charge.

Defendant contends the plea should have been withdrawn and he allowed to present his case to a jury.

STATEMENT OF CASE

This is an appeal from a third degree felony conviction for burglary, a violation of U.C.A. 76-6-202. The defendant motion to withdraw his plea and the motion was denied by the trial court. The defendant now appeals.

RELEVANT FACTUAL STATEMENT

The defendant was convicted of 'burglary', a violation of 76-6-202. On February 14, 2006 the defendant entered a plea of guilty to the offense of burglary. The factual statement offered by the State at the arraignment merely restated the burglary statute's elements --- the defendant entered with an intent to assault. *Transcript page 5 lines 6-9.*

Prior to sentencing, the defendant then motioned the Court to allow him to withdraw his plea of guilty. On June 20, 2006, the Court denied the motion to withdraw the plea and the defendant was then sentenced on August 7, 2006.

The charge is based on the defendant's entrance into a home of another. Mr. Bunker was looking for an Isaac Woods.

The Court's ruling found that the Mr. Bunker was carrying a flashlight and he had used abusive language looking for an Isaac Woods. When Mr. Woods was not located, the defendant then left. The Court further found that no assault, theft, nor felony occurred during at the home. When the police encountered the defendant later, the defendant reported the 'it would have been ugly' if Mr. Woods had been found.

Defendant's motion to withdraw his plea asserted that his conduct was a trespass and not a burglary. Defendant compared the statutes (U.C.A. 76-6-202 (Burglary) and U.C.A. 76-2-206 (trespassing)) and concluded that his conduct was proscribed more appropriately under the trespassing statute. Defendant further cited State v.Shondell, 22 Utah 2d 343, 453 P.2d 146 (1969) arguing when the criminal conduct is defined by two competing statutes, the defendant is entitled to the lesser charge. U.C.A. 77-17-1.

Denying the motion to withdraw the plea, the Court found the defendant to have knowingly and voluntarily entered his guilty plea. *Page 2 of Court's Memorandum Decision.* The Court did, however, note that the defendant had not been advised by previous counsel of the possible application of the trespassing statute.

The trial court then proceeded with an analysis on a determination of ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 687-88 (1984). The Court found prior counsel's performance not deficient and the defendant not prejudiced.

The trial court found that trespass is a lesser included offense to the charge of burglary. The trial court distinguished this conduct as a 'burglary'. Based solely on the language "it would have been ugly", the trial court concluded that Mr. Bunker entered the home with intent to assault. The Court did not address the issue why the same language "it could have been ugly", did not fall under the trespass statute. U.C.A. 76-2-206.

Defendant argued that it would a violation of the equal protection clause to convict the defendant of 'burglary' as opposed to 'trespass' since the statutes cover the same proscribed conduct. This motion was also denied.

BRIEF STATEMENT OF THE ARGUMENT

Defendant entered the home of Mr. Woods. The only evidence to suggest his intent once inside the home was a statement to police that "it would have been ugly".

The provisions of U.C.A. 76-6-206 proscribe the defendant's conduct. U.C.A. 76-6-206 provides:

> (2) A person is guilty of criminal trespass if, under circumstances . . .:
>
> (a) he enters or remains unlawfully on property and:
>
> (i) intends to cause annoyance or injury to any person or damage to any property, . . .
>
> (ii) intends to commit any crime, other than theft or a felony; or

The State charged the defendant with 'burglary' alleging he entered the home with the intent to assault. The terminology that "it would have been ugly" does not fall within the 'burglary ' statute and should have been held to be within the lesser charge of 'trespass'.

DETAILED ARGUMENT

The provisions of U.C.A. 76-6-206 (trespass) proscribes the defendant's conduct. U.C.A. 76-6-206 (2) provides:

> (2) A person is guilty of criminal trespass if, under circumstances not amounting to burglary . . .:
>
> (a) he enters or remains unlawfully on property and:

(i) intends to cause annoyance or injury to any person or damage to any property, . . .;
(iv) intends to commit any crime, other than theft or a felony; . . .

In deference to the plea, the trial court found the language "it would have been ugly" as dispositive of the element 'intent to assault'. This as opposed to the trespass element of intent to commit "annoyance or injury to any person or damage to any property". The trial court's conclusion requires an improper inference or presumption beyond what the facts justify. The law cannot presume an intention beyond what was so realized. State v. Castonguay, 663 P.2d 1323 (Utah 1983).

The trial court analysis hinged on the performance of previous counsel and whether such conduct was deficient. The trial court overlooked the recent appellate court decision finding ineffective assistance of counsel. In State v. Ison, 2006 Ut 26, 135 P.3d 864, the court found ineffective where the failure to admit the findings of an Administrative Law Judge as evidence. In State v. Perez-Avila, 2006 UT App 71 131 P.3d 864 the Court found in a similar case to the present that counsel's performance was deficient for failing note a DUI charge to be a lesser included offense to automobile homicide. In State v. Hernandez, 2005 UT App 546, 128

P.3d 556 found ineffective assistance because trial counsel failed to investigate crucial defense witnesses.

The Court further suggested that defendant suffered no prejudice. The court overlooks the obvious prejudice of a felony conviction as opposed to a misdemeanor conviction.

Defendant argues that the analysis herein should be based on whether a defendant "knowingly and voluntarily" entered his plea as opposed to an analysis of whether counsel's performance was sufficient. U.C.A. 77-13-6.

KNOWINGLY AND VOLUNTARILY ENTERS A PLEA

A plea of guilty may be withdrawn upon a showing that it was not knowingly and voluntarily made. U.C.A. 77-13-6. Rule 11(e)(4)(A) of the Utah Rules of Criminal Procedure requires the defendant understands the nature and elements of the offense to which the plea is entered.

Case law suggests that "a guilty plea must be knowingly and voluntarily made in order to protect a defendant's due process rights." State v. Mora, 2003 Ut App 117, 69 P.3d 838. If that process is not followed, under Utah law there is a presumed harm. See also Bluemel v. State, 2006 UT App 141, 134 P.3d 181.

Unless he is fully advised, a defendant cannot make a fully informed decision. 'Knowingly' mandates that the defendant understands the law and how his conduct applies to the charged offense. This would suggest an understanding of the elements of the offense.

In State v. Frampton, 737 P.2d at 187-88 (Utah 1987, the Court found the term "knowingly" to include a full understanding as applied to the right to counsel. Frampton required a sixteen point inquiry of the right to counsel. See also State v. Ferguson, 2007 Ut 1, No. 20050376; State v. Houston, 2006 UT App 437 147 P.3d 543.

To sustain this plea, defendant must have a full comprehension of the law respecting the elements of the offense charged. The only factual basis offered by the State was a repeat of the statutory elements of burglary.

The defendant should have also a full understanding of the elements to the offense and be able to distinguish between the offense charged and any lesser included offenses as here.

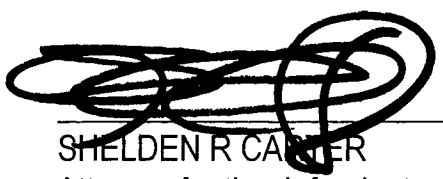
If the trial court's colloquy fails to demonstrate such knowledge, the plea should be withdrawn.

CONCLUSION

The motion to withdraw defendant's plea should have been granted. The Court improperly concluded the language "it would have been ugly' met statutory elements of the burglary statute. This inference of intent could have just as well inferred the statutory elements of trespass --- he entered with the intent to cause an annoyance or injury to person or property.

The defendant did not have a full understanding the elements of the offense pled. Failing a knowledgeable and voluntary plea of guilty, the motion to withdraw such plea must be withdrawn.

DATED this 14th day of February, 2007.



SHELDEN R CARTER
Attorney for the defendant

ADDENDUM

1. Trial Court decision.

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. **DARRELL BUNKER,** Defendant.	**RULING AND ORDER DENYING DEFENDANT'S MOTIONS TO WITHDRAW GUILTY PLEA AND TO DISMISS** Case No. 051403057 Judge Samuel D. McVey

Defendant timely filed his Motion to Withdraw Guilty Plea before sentencing. Defendant also filed a Motion to Dismiss the charge to which he pleaded guilty. The Court, having carefully considered and reviewed the record in this matter and the memoranda submitted by the parties, makes the following ruling and order.

I.
PROCEDURAL HISTORY AND BACKGROUND

On May 14, 2005, defendant, Darrell Bunker, went to the home of Wendy Wood around midnight and pounded on the door. Ms. Wood's fourteen year old daughter answered the door. Defendant stated he was searching for Isaac Wood, who also lived at the home. Defendant carried a large flashlight that looked like a crow bar to Ms. Wood's daughter. He used abusive language. When informed Isaac was not home, defendant entered the home uninvited and searched several rooms of the house for Isaac, despite being asked to leave by Ms. Wood's daughter. After failing to find Isaac in the house, defendant searched the yard and vehicles in the driveway. Also failing to find Isaac outside, defendant left.

Defendant later met with officers who contacted him after Ms. Wood informed them of her daughter's encounter with him. At that time, defendant disclosed to officers that he had entered the home with intent to assault Isaac, specifically stating that it "would have been ugly" had he found Isaac at home that night. Defendant was charged with burglary under section 76-6-202 of the Utah Code and eventually pled guilty to burglary as a third-degree felony on February 14, 2006. In exchange for his plea, the State reduced the charge from second-degree felony burglary. The State also agreed to recommend probation for two years, work release if defendant were sentenced to serve time in jail, and a possible reduction of the charge to a class A misdemeanor pursuant to section 76-3-402 of the Utah Code. However, prior to sentencing, defendant filed the present motions.

II.
ANALYSIS AND RULING

Defendant argues he entered a guilty plea to burglary based only on prior counsel's advice. defendant claims prior counsel's advice was poor because the facts of his case constitute criminal trespass rather than burglary. Defendant also argues his burglary charge should be dismissed because both the burglary and criminal trespass statutes cover the same conduct. Thus, he argues he should only be sentenced under the criminal trespass statute, which provides for the lesser penalty.

The State argues defendant was properly advised by prior counsel and entered his guilty plea to burglary knowingly and voluntarily after a proper colloquy. The State also argues defendant's acts were properly charged as burglary and that the burglary and criminal trespass statutes are clearly distinguishable from one another. Further, the State contends defendant's motion to dismiss is moot because defendant already pled guilty to burglary.

A. Defendant's Guilty Plea Was Entered Knowingly and Voluntarily

Withdrawal of guilty pleas is governed by section 77-13-6(2)(a) of the Utah Code Annotated, which provides, "[a] plea of guilty . . . may be withdrawn only upon leave of the court and a showing that it was not knowingly and voluntarily made." Strict compliance with rule 11(e) of the Utah Rules of Criminal Procedure, which we have here and which has not been challenged by defendant, creates a presumption a plea was voluntarily entered. *State v. Gamblin*, 2000 UT 44, ¶11, 1 P.3d 1108.

However, defendant argues he was misdirected by former counsel in entering his plea of guilty to burglary as a third degree felony. Defendant argues he was denied effective assistance of counsel because former counsel failed to advise him his actions may have amounted only to criminal trespass, a misdemeanor, rather than burglary. Defendant claims he entered his guilty plea in reliance upon poor advice of counsel, making his plea unknowing.

The *Strickland* test applies to guilty pleas challenged on the basis of ineffective assistance of counsel. *State v. Martinez*, 2001 UT 12, ¶16, 26 P.3d 203 (citing *Hill v. Lockhart*, 474 U.S. 52, 58 (1985)). Under the Strickland test, one has been denied effective assistance of counsel where: (1) counsel's performance was deficient below an objective standard of reasonable professional judgment, and (2) counsel's performance prejudiced the defendant. *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). In the context of a guilty plea, to show prejudice a "defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* (quoting *Hill*, 474 U.S. at 59).

In the case at hand, defendant has not made a sufficient showing prior counsel's performance was deficient or he was prejudiced by that performance. Defendant claims prior counsel should have informed him that his acts constituted criminal trespass rather than burglary. The facts of this case involve unlawful entry with intent to commit an assault. To commit burglary a person must enter or remain unlawfully in a building or any portion of a building with intent to commit an assault, a theft, or a felony. UTAH CODE ANN. § 76-6-202(1)(a)-©) (1999). Burglary is a third degree felony unless it is committed in a dwelling, in which case it is a second degree felony. UTAH CODE ANN. § 76-6-202(2) (1999). The relevant portion of the criminal trespass statute requires that under circumstances not amounting to burglary, one enters or remains unlawfully on property and intends

to cause annoyance or injury to any person or damage to any property, or intends to commit any crime other than theft or a felony. UTAH CODE ANN. § 76-6-206(2)(a)(I)-(ii) (1999). Criminal trespass is a class C misdemeanor unless it is committed in a dwelling, in which case it is a class B misdemeanor. UTAH CODE ANN. § 76-6-206(3)(a) (1999).

Criminal trespass has been found to be a lesser included offense of burglary, with the primary difference between the offenses a differing *mens rea*. *See State v. Baker*, 671 P.2d 152, 159 (Utah 1983). However, in burglary trials courts have not been required to instruct juries on the lesser offense of criminal trespass unless the evidence was ambiguous or subject to an alternative interpretation. *Id.* (where the evidence showed a former employee broke into a gas station, rummaged through a desk, and hid in a closet when the owner and police arrived, the evidence was not ambiguous or subject to any alternative interpretation and thus the court was not required to instruct on the lesser offense of criminal trespass).

The facts of this case clearly provide a basis for defendant's plea of guilty to burglary. Defendant entered the home unlawfully without the consent of Ms. Wood's teenage daughter and remained after he was asked to leave. He carried a flashlight that Ms. Wood's daughter mistook for a crowbar. It could have been used as a weapon. Most tellingly, he displayed an angry and abusive disposition in entering the home and in his search for Isaac Wood. He later admitted to police that he intended to assault Isaac in the home. Although defendant contends that no assault actually occurred while in the home, all the burglary statute requires is intent to commit an assault. The foregoing conduct amounts to burglary rather than criminal trespass because defendant specifically had intent to commit an assault while in the home unlawfully. Moreover, since courts do not have instruct juries on the lesser included offense of criminal trespass where the facts are unambiguous, it was not objectively deficient for counsel to fail to advise defendant that his conduct might amount to criminal trespass rather than burglary. Defendant was not misled as the evidence in this case is not ambiguous or subject to an alternative interpretation.

Finally, prior counsel succeeded in obtaining a favorable disposition for defendant, as defendant was able to plead guilty to burglary as a third degree felony rather than risk conviction of a second degree felony. Defendant's plea agreement provided him with the benefit of work release and his plea included a stipulation from the state to recommend a reduction of his conviction to a class A misdemeanor pursuant to Utah Code § 76-3-402. Prior counsel also filed the 402 motion prior to being replaced. Thus, defendant got a good deal-- a "meaningful benefit in exchange for [his] guilty plea[, which] is an additional indication that counsel acted reasonably in advising the defendant to accept the plea." *State v. Marvin*, 964 P.2d 313, 317 (Utah 1998).

Defendant also fails to show sufficient prejudice. Although defendant contends his conduct was not burglary and that he would not have pleaded guilty but for prior counsel's advice, his assertions are not dispositive. Even had defendant been advised of the possibility of arguing the alternative of criminal trespass to a jury, he received a substantial bargain in return for his guilty plea to burglary as a third degree felony, including avoiding the risk a jury might convict him of burglary as a second degree felony; or the court might not have agreed to provide a jury instruction for the lesser included offense of criminal trespass. Other than his assertion that his conduct was not burglary, defendant has not adequately shown a reasonable probability that he would have insisted on going to trial but for prior counsel's advice.

Therefore, because defendant has not shown prior counsel's performance was deficient below an objective standard of reasonable professional judgment, and because defendant has not shown the necessary prejudice, his motion to withdraw his plea is denied.

B. Defendant Was Properly Charged With Burglary

In his motion to dismiss, defendant argues the burglary and criminal trespass statutes proscribe the same conduct and he should have been charged with criminal trespass rather than burglary under the "doctrine" specified in *State v. Shondel*, 453 P.2d 146, 147-48 (Utah 1969). Defendant also argues the overlap between the statutes violates his right to equal protection. The *State* argues the *Shondel* doctrine is inapplicable here because the burglary and criminal trespass statutes proscribe different conduct.

Shondel provided where two statutes define exactly the same penal offense, a defendant can be sentenced only under the statute with the lesser penalty. *State v. Bluff*, 2002 UT 66, ¶33, 53 P.3d 1210 (citing *State v. Shondel, supra*, 453 P.2d at 147-48). However, rule "necessarily applies only when the two statutes address 'exactly the same conduct.'" *Id.* (quoting *State v. Gomez*, 722 P.2d 747, 749 (Utah 1986)). Thus, if the elements of the crimes are not identical and "the relevant statutes require proof of some fact or element not required to establish the other, the statutes do not proscribe the same conduct." *State v. Jensen*, 2004 UT App 467, ¶16, 105 P.3d 951 (quoting *State v. Green*, 2000 UT App 33, ¶6, 995 P.2d 1250). Thus, Utah courts compare the plain language of the statutes to determine if they cover the same conduct and if their elements are wholly duplicative. *Id.*

In this case, *Shondel* is inapplicable because sections 76-6-202 and 76-6-206 of the Utah Code do not prohibit the exact same conduct. The facts of this case involve unlawful entry with intent to commit an assault. The relevant burglary statute provides a person must enter or remain unlawfully in a building or any portion of a building with intent to commit an assault, a theft, or a felony. UTAH CODE ANN. § 76-6-202(1)(a)-(c) (1999). The relevant portion of the criminal trespass statute requires that *under circumstances not amounting to burglary*, one enters or remains unlawfully on property and intends to cause annoyance or injury to any person or damage to any property, or intends to commit any crime other than theft or a felony. UTAH CODE ANN. § 76-6-206(2)(a)(I)-(ii) (1999).

While the Utah Supreme Court has determined criminal trespass can be a lesser included offense of burglary, that Court has also held the two offenses require different forms of *mens rea*. *See State v. Hansen*, 734 P.2d 421, 431 (Utah 1986) (Howe, J., concurring and dissenting); *State v. Baker*, 671 P.2d 152, 159 (Utah 1983). Although defendant argues the intent to assault required for burglary may also fall within the intent to cause injury to any person required for criminal trespass statute, the Court disagrees. Assault is specifically defined by Utah Code § 76-5-102 to include attempts and threats to cause "bodily injury," another term specifically defined by statute, while intent to injure is undefined and could plainly include many types of injury not amounting to bodily injury. Moreover, the criminal trespass statute specifically provides it only comes into effect "under circumstances not amounting to burglary as defined in Section 76-6-202." UTAH CODE ANN. § 76-6-202(2). This phrase plainly demonstrates the two statutes, although similar, were intended by the legislature to prohibit different conduct. Therefore, burglary and criminal trespass do not address exactly the same conduct and are clearly distinguishable because they require proof of different

mental states. Defendant was properly charged with burglary without any violation of his right to equal protection.[1]

ORDER

WHEREFORE, it is ordered the Motion to Withdraw Guilty Plea and the Motion to Dismiss are DENIED.

Signed this 14th day of June, 2006.

SAMUEL D. McVEY
District Court Judge

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STATE OF UTAH
FOURTH DIST. COURT · UTAH COUNTY

[1]As a procedural matter, the motion to dismiss is untimely where defendant has already been convicted However, the Court addresses the issue for the record in this matter.

CERTIFICATE OF SERVICE

I hereby certify that, on the _____ day of June, 2006, I caused a true and correct copy of the foregoing **RULING AND ORDER ON DEFENDANT'S MOTIONS TO WITHDRAW GUILTY PLEA AND TO DISMISS** to be delivered to the following parties:

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Shelden R. Carter
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3325 University Ave., Suite 200
Provo, UT 84606

ORIGINAL IF IN RED INK
STATE OF UTAH
FOURTH DIST. COURT · UTAH COUNTY

Clerk

MAILING CERTIFICATE

I HEREBY CERTIFY that I personally mailed a true and correct copy of the foregoing on this 15 day of February, 2007, by first-class, U.S. Mail, postage prepaid to the following:

Attorney General for the State of Utah (four copies)
124 State Capitol
Salt Lake City, Utah 84114

Utah Court of Appeals (eighth copies)
450 South State
#500
Salt Lake City, Utah 84114-0230