

2009

State of Utah v. Michael J. Birkeland : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

~~FILED
UTAH APPELLATE COURTS~~

~~APR 16 2010~~

~~FILED
UTAH APPELLATE COURTS~~

~~APR 14 2010~~

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STATE OF UTAH,

Plaintiff / Appellee,

vs.

Case No: 20090766-CA

MICHAEL J. BIRKELAND,

Defendant / Appellant.

BRIEF OF APPELLANT

APPEAL FROM THE FOURTH DISTRICT COURT, UTAH COUNTY, STATE OF UTAH, FROM THE RESTITUTION ORDER FOLLOWING A NO CONTEST PLEA TO THEFT, A CLASS A MISDEMEANOR, BEFORE THE HONORABLE CLAUDIA LAYCOCK

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**FILED
UTAH APPELLATE COURT**

APR 23 2010

IN THE UTAH COURT OF APPEALS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

JURISDICTION OF THE UTAH COURT OF APPEALS 1

ISSUES PRESENTED AND STANDARDS OF REVIEW 1-2

CONTROLLING STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 2-4

STATEMENT OF RELEVANT FACTS 4-8

SUMMARY OF ARGUMENT 8-9

ARGUMENT

 I. The Trial Court Erred by Ordering Restitution Because Stewart was a Salaried Employee Of the University and Suffered No Pecuniary (Economic) Harm as Required Per Utah Code Ann. § 77-38a-302..... 9-13

 II. The Trial Court Erred by Ordering Restitution for Criminal Activity that Birkeland Neither Admitted To, Pled Guilty To or Agreed To Pay..... 13-17

CONCLUSION AND PRECISE RELIEF SOUGHT 17

ADDENDUM

Utah Code Annotated § 77-38a-102

Utah Code Annotated § 77-38a-302

Trial Court’s *Findings of Fact, Conclusions of Law and Order*

Exhibit #1

Statement of Defendant in Support of No Contest Plea and Certificate of Counsel

TABLE OF AUTHORITIES

Statutory Provisions

Utah Code Annotated § 76-6-102.....	17
Utah Code Annotated. § 76-6-412(1)(c).....	3, 14
Utah Code Annotated. § 76-6-404.....	2-3, 15
Utah Code Annotated §§ 77-38a-102.....	1-4, 8-10, 12, 14-16
Utah Code Annotated §§ 77-38a-302.....	8-15

State Cases Cited

<u>State v. Brickley</u> , 2002 UT App 342, ¶ 12, 60 P.3d 582.....	16
<u>State v. Brown</u> , 2009 UT App 285, 221 P.3d 273.....	11, 13
<u>State v. Corbitt</u> , 2003 UT App 417, 82 P.3d 211.....	12
<u>State v. Garcia</u> , 866 P.2d 5 (Utah Ct. App. 1993).....	1-2
<u>State v. Gibson</u> , 2006 UT App 490, 153 P.3d 771.....	1-2
<u>State v. Harvell</u> , 2009 UT App 271, 220 P.3d 174.....	11, 13
<u>State v. Larsen</u> , 2009 UT App 293, 221 P.3d 277.....	11
<u>State v. Mast</u> , 2001 UT App 402, 40 P.3d 1143.....	11, 13, 16-17
<u>State v. Watson</u> , 1999 UT App 273, ¶ 3, 987 P.2d 1289.....	13, 15-17

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff / Appellee, vs. MICHAEL J. BIRKELAND, Defendant / Appellant.	Case No: 20090766-CA
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BRIEF OF APPELLANT

JURISDICTION OF THE UTAH COURT OF APPEALS

This Court has appellate jurisdiction in this matter pursuant to the provisions of Utah Code Annotated § 78A-4-103(2)(e).

ISSUES PRESENTED AND STANDARDS OF REVIEW

Issue: Whether the trial court erred by denying Defendant’s opposition to restitution by finding that under Utah Code Ann. § 77-38a-102(6) the victim suffered “pecuniary harm” because data from his employer’s laptop computer was corrupted. (R. 48-44; 66-69; 81: 23-40).

Standard of Review: When the issue of whether restitution was proper based on statutory interpretation, the trial court’s interpretation of a statute presents a question of law for which the lower court’s statutory interpretation is given no deference, but

is assessed for correctness. State v. Garcia, 866 P.2d 5, 6 (Utah Ct. App. 1993); see also, State v. Gibson, 2006 UT App 490, ¶ 6, 153 P.3d 771.

Issue: Whether the trial court erred by concluding that the Defendant's no contest plea to a misdemeanor qualified as an admission of "criminal activity" under Utah Code Ann. § 77-38-102(2) and thus permitted imposition of restitution of \$9,838.00. (R. 48-44; 66-69; 81: 23-40).

Standard of Review: When the issue of whether restitution was proper based on statutory interpretation, the trial court's interpretation of a statute presents a question of law for which the lower court's statutory interpretation is given no deference, but is assessed for correctness. State v. Garcia, 866 P.2d 5, 6 (Utah Ct. App. 1993); see also, State v. Gibson, 2006 UT App 490, ¶ 6, 153 P.3d 771.

CONTROLLING STATUTORY PROVISIONS

All controlling statutes and constitutional provisions are contained in the Addendum.

STATEMENT OF THE CASE

A. Nature of the Case

Michael Birkeland appeals from the restitution order of \$9,838.00 by the Honorable Claudia Laycock, Fourth District Court, arising from a no contest plea to an amended charge of Theft, a class A misdemeanor, per Utah Code Ann. § 76-6-404 (1973). (R. 27-20; 80: 3, 5).

B. Trial Court Proceedings and Disposition

Michael Birkeland was charged by criminal information, filed in the Fourth District Court on July 18, 2008, of a single count of Theft, a third-degree felony, in violation of Utah Code Ann. §§ 76-6-404 (1973) and 76-6-412 (1997). (R. 1). Subsequently, on December 22, 2008, Birkeland pled no contest to the amended charge of Theft, a class A misdemeanor, in violation of Utah Code Ann. § 76-6-404 (1973) and classified as such based on value of \$300.00 to \$1,000.00. (R. 20-27).

At Sentencing, on November 19, 2008, a Misdemeanor Sentencing Guideline Recommendation was prepared by Adult Probation and Parole. Judge Laycock suspended the maximum jail sentence, placed Birkeland on court supervised probation, and imposed a fine of \$765.00 plus \$250.00 attorney recoupment fee. (R. 32-34). At that time, a Restitution Hearing was set for January 14, 2009.

At the Restitution Hearing, Perry Stewart, a professor employed by Utah Valley University, testified about the stolen laptop and its contents. (R. 78). Following the Hearing, the State filed its Motion and Proposed Order for Restitution. (R. 42-39). Birkeland then filed his Objection to the Proposed Order with the State's Reply following. (R. 48-43; 52-49). After Oral Argument regarding imposition of restitution, the trial court issued its Findings of Fact, Conclusions of Law and Order. (R. 81; 69-65). The trial court concluded that Stewart suffered "pecuniary damage" which could be recovered in a civil action and thus qualifies as proper restitution under Utah Code Ann. § 77-38a-102(6) (2005). (R. 67).

Furthermore, the trial court denied Birkeland's argument that his no contest plea to a class A misdemeanor did not qualify as "criminal activity" as defined by Utah Code Ann. § 77-38a-102(2) (2005). (R. 67).

After a restitution hearing and briefing on the restitution issue, the trial court ordered Birkeland to pay a modified restitution amount. (R. 68; 66). Although Stewart estimated his hourly wage at \$50.00 with approximately 950 hours of work in preparing the documents on the laptop (totaling \$47,500), the trial court determined that Stewart's hourly wage was \$41.00 and permitted him to collect on 25% of the hours reported (238 hours) for a total of \$9,758.00 in restitution to Stewart, plus and additional \$80.00 to Utah Valley University for payment to MacDocs in attempting to recover the files, totaling \$9838.00 in restitution. (R. 68; 66).

STATEMENT OF RELEVANT FACTS

A. Testimony of Perry Stewart

At the time of the theft, Stewart was employed by Utah Valley University as an art professor, teaching art design, illustration, drawing, and painting. (R. 78: 4). The year of the theft, 2008, the University paid Stewart \$64,000 in salary. (R. 78: 20). Stewart estimated that in his full-time teaching capacity, he will spend between somewhere around 30 hours per week preparing for classes and anywhere between 5 and 25 hours per week fulfilling other scholarly or academic requirements. (R. 78: 20).

Stewart testified that since the theft he has had to put in more time at work to fix the problems related to the theft. (R. 78: 20). However, he also testified that his income was unaffected. (R. 78: 20-21).

Stewart was requesting \$47,500 in restitution to recreate documents either deleted or inoperable due to the theft of the University's laptop. (R. 78: 12) (Exhibit 1). Stewart described the laptop that was taken as a silver, Mac Book Pro, which was purchased by the University for his use in the classroom. (R. 78: 4).

Stewart possessed the laptop for approximately two years before it was stolen. (R. 78: 5). On a day-to-day basis Stewart would use images and presentations and project them in class using a LCD projector, take attendance, and do grading all on the laptop. (R. 78: 5). These presentations generally were configured through Power Point and contained pictures/images. (R. 78: 5). Although Stewart did not email or print these presentations, he would allow students to copy the Power Point presentation. (R. 78: 6). These presentations were created by Stewart and not provided to him by the University. (R. 78: 6).

Stewart's schedule and use of the laptop presentations varied. (R. 78: 6-7). The time that he spent on the presentations depended on whether he had new material or not; although a lot of the presentations he had created in the past. (R. 78: 7). Stewart estimated that each presentation would take him about six (6) to eight (8) hours to create. (R. 78: 7).

Stewart testified that from the day the laptop was taken to the day it was returned to him, most of the information on the computer was deleted, leaving some recovered files. (R. 78: 8). Stewart took the laptop to Mac Docs in Orem, Utah to attempt to recover the lost files. (R. 78: 8). Mac Docs were able to recover nearly 27,000 documents, which appeared unidentifiable by file name, unless Stewart was to open the

files, identify them, and rename and save them. (R. 78: 9). Many of the Power Point presentations, however, would not open after they were recovered. (R. 78: 9). Stewart testified that he was in the process of recreating these files. (R. 78: 9).

Stewart also testified about the process he has gone through to calculate and value the time spent on recreating these presentations. (R. 78: 11). Stewart testified that he went through the documents recovered to determine how many were still intact, which took “hundreds of hours.” (R. 78: 11). Then, Stewart counted all the files that would not open, but focused on the Power Point presentations because of the time required in creating them, which was between 3-10 hours each. (R. 78: 11-12).

Based on his calculations, Stewart estimated that he would have to recreate at least one hundred (100) of the presentations because they were either deleted or inoperable. (R. 78: 12). Stewart provided his estimations in recreating the work lost and the value of that work in a document presented at the restitution hearing. (Exhibit 1). In that document, Stewart estimated that in recreating only the Power Point presentations, he would spend about 600 hours recreating 100 presentations – approximately 6 hours per presentation. (Exhibit 1) (R. 78: 15). Then, estimating the value at \$50 per hour and multiplying that by the 600 hours, Stewart calculated that it would cost \$30,000 to recreate the Power Point presentations. (Exhibit 1) (R. 78: 15-16). Furthermore, Stewart determined that in the past few months he had spent about 350 hours recreating syllabi, course content and lectures. Using similar calculations (\$50 per hour multiplied by 350 hours of work), Stewart concluded an additional \$17,500 value in work to recreate

documents. (Exhibit 1). This totaled \$47,500, plus an additional \$78 for the University for costs to Mac Docs to retrieve files from the computer. (Exhibit 1) (R. 78: 13-14, 17).

B. Testimony of Michael Birkeland

Birkeland testified with regards to his ability to pay restitution. (R. 81: 4). Birkeland testified that he was a self-employed salesman through his company Killer B, but contracted with another company, Full Nelson Creative, to sell radio and television advertising. (R. 81: 6-8). With regards to his employment, Birkeland testified that the advertisement business has suffered due to the economy. (R. 81: 14). And that while a few years ago he was earning \$3,000 to \$4,000 per month; his current income was usually about \$1,500 per month. (R. 81: 5-6, 14). Of that \$1,500, about \$1,200 was attributed to residual sales from the previous year. (R. 81: 5-6, 13-14).

Of that income, Birkeland paid \$1,200 per month in child support to his ex-wife, leaving him with approximately \$300 to \$800 per month. (R. 81: 6). Birkeland owned no assets and was living rent and utility free in a friend's apartment in Salt Lake City. (R. 81: 6, 21-22). Birkeland testified that while he did have three years of college education, but was hesitant to return to school because of the financial stresses with having approximately \$24,000 in student-loan debt, which was to be paid at about \$320 per month. (R. 81: 7-8, 16).

Birkeland also testified about another possible source of income. Birkeland testified that he was employed as an actor in several "lower than normal Hollywood scale," non-union films. (R. 81: 10). Between 2001 and 2006, Birkeland was employed as an actor in several films: *Single's Ward*, *The R.M.*, *Home Teachers*, *Church Ball*,

Single Second Ward, Latter-Day Night Live, and Shooting Star. (R 81: 10-11).

Birkeland testified that work on these projects would typically last a few weeks and he would be paid about \$150 per day for his services. (R. 81: 11).

Additionally, Birkeland testified about what his “thoughts” were regarding the State’s request for restitution in the amount of \$47,000. (R. 81: 19).

STATE: Okay. Mr. Beirkeland (sic), what are your thoughts about what you heard Mr. Stewart say about the economic injury that he alleges to have incurred?

BIRKELAND: Well, depends. I don’t know how far I can speak into that.

STATE: Okay.

BIRKELAND: To what level. I didn’t plead guilty. I pled no contest. I’m the one that reported the computer. He didn’t report the computer stolen at all. Ever.

STATE: Okay.

BIRKELAND: So I have a lot of objections, but I don’t know how far I can go into that.

STATE: No, that’s actually the answer I was looking for.

(R. 81: 21).

SUMMARY OF ARGUMENT

Trial courts are bound by the parameters of Utah Code Annotated §§ 77-38a-102 and 302 in assessing restitution. Furthermore, a trial court cannot grant restitution for anything other than pecuniary harm, which is defined as economic injury. Here, Birkeland had pled no contest to theft, a class A misdemeanor, for having deprived Stewart of the laptop provided to Stewart by his employer, Utah Valley University.

While the laptop was recovered some documents/files were either deleted or corrupted and could not be accessed and Stewart began to recreate these documents/files. Birkeland asserts that the harm incurred by Stewart, while inconvenient, was a temporal harm, not a pecuniary, or economic, harm. Therefore, the trial court erred by interpreting the restitution statute to cover such harm and the order should be rescinded.

Second, the trial court further erred by ordering restitution in light of the fact that Birkeland did not agree to pay such restitution, never admitted to deleting or corrupting the data on the computer, nor was restitution appropriate because the “criminal activity” for which Birkeland pled no contest to was theft of the laptop computer, not criminal mischief and destruction of those items. Therefore, the restitution order was unlawful and should be rescinded.

ARGUMENT

I. The Trial Court Erred by Ordering Restitution Because Stewart was a Salaried Employee Of the University and Suffered No Pecuniary (Economic) Harm as Required Per Utah Code Ann. § 77-38a-302

In its Conclusions of Law, the trial court erred in rejecting Birkeland’s objection to the restitution request on the basis that Stewart “did not suffer pecuniary damage as denied in Utah Code Ann. § 77-38a-102(6).” (R. 67). The trial court’s basis for rejecting Birkeland’s objection to restitution was that that in his objection “the defendant focused only on the language addressing fair market value, lost earnings and medical expenses. The defendant’s argument is invalid because it ignores the language in the statute which defines pecuniary damage as economic injury which could be recovered in civil action.” (R. 67). The trial court further concluded that Stewart could have recovered in a civil

action and that Birkeland “incorrectly treats the statute’s language as exclusionary, not inclusive[;]” such as punitive or exemplary damages, which are excluded. (R. 67). The trial court, however, incorrectly interpreted the language and scope of Utah Code Ann. § 77-38a-302 (2005) in ordering \$9,758.00 in restitution to Stewart.

Utah Code Annotated. § 77-38a-302 (2005) clearly lays out the criterion for assessing restitution following a criminal conviction. The code states that “[w]hen a defendant is convicted of criminal activity that has resulted in *pecuniary damages* ...the court shall order that the defendant make restitution to victims of crime as provided in this chapter....” Utah Code Ann. § 77-38a-302(1) (2005) (emphasis added). Thus, any restitution ordered is predicated on demonstrable pecuniary damages.

Per section 77-38a-102(6) (2005), “pecuniary damage” is defined as “all demonstrable *economic injury* ...which a person could recover in a civil action arising out of the facts or events constituting the defendant's criminal activities and includes the fair market value of property taken, destroyed, broken, or otherwise harmed, and losses including lost earnings....” (emphasis added). While the phrase “economic injury” is not defined by statute, its common meaning would be damages to resources that would in turn adversely affect, through impaired production, use or distribution of those resources, income streaming from those resources. Cf, economic. Dictionary.com. *Dictionary.com Unabridged*. Random House, Inc. <http://dictionary.reference.com/browse/economic> (accessed: April 12, 2010). This meaning of economic injury, within the meaning of pecuniary damages, is consistent with decisions from the Utah appellate courts.

For example, in State v. Brown, 2009 UT App 285, 221 P.3d 273, this Court found that the victim was not entitled to restitution for her relocation expenses. Although this Court did not reach the issue of whether such restitution was appropriate by statute, it did address the principle of whether “[r]estitution may be ordered for pecuniary damages arising out of the defendant’s criminal activity.” Brown, 2009 UT App 285, ¶ 10. In Brown, the State sought restitution against Brown for relocation expenses of \$2,789.74 his girlfriend incurred due to Brown’s criminal activity. Brown, 2009 UT App 285, ¶ 4. Obviously, Brown’s girlfriend paid out-of-pocket to relocate, due to Brown’s actions, and was seeking reimbursement. While this Court ultimately concluded that the record was insufficient to support restitution for relocation expenses, Brown provides a clear example of what pecuniary damage is and distinguishes the present facts.

Another clear example of pecuniary damage appears in State v. Harvell, 2009 UT App 271, 220 P.3d 174. Implicitly, this Court addressed the restitution matter because it believed that the harm caused qualified as “pecuniary damage” under Utah Code Ann. § 77-38a-302. Harvell, 2009 UT App 271, ¶ 8. In Harvell, the defendant appealed a restitution order requiring him to pay for brake repairs and to replace an iPod. Harvell, 2009 UT App 271, ¶ 7. The restitution ordered in Harvell arose from his criminal activity – being charged with burglary, theft by receiving, and theft. Harvell, 2009 UT App 271, ¶ 6. Again, this Court addressed other more central issues, but implicitly must have concluded that replacing the brakes and the iPod qualified as pecuniary damage, distinguishable from the present facts. See also, State v. Mast, 2001 UT App 402, 40 P.3d 1143 (restitution for stolen property was appropriate); State v. Larsen, 2009 UT App

293, 221 P.3d 277 (restitution to reimburse victim for costs associated with impound of vehicle was appropriate); and State v. Corbitt, 2003 UT App 417, 82 P.3d 211 (restitution arising from defendant having stolen a vehicle was appropriate).

Here, Stewart did not incur “pecuniary damage” because no “economic injury” occurred. Stewart testified that he was a salaried professor for Utah Valley University, earning approximately \$64,000 per year at that time. (R. 78: 20). Although the University’s laptop was taken for a brief time, and Stewart was able to continue teaching. In fact, Stewart testified that even if the computer had not been taken he would have earned the same salary. (R. 78: 20). Thus, regardless of whether the laptop was recovered or not, Stewart would have had suffered no adverse financial impact. Any loss incurred by Stewart was not a qualified pecuniary damage for purposes of restitution because no economic injury occurred.

Under different circumstances pecuniary damages would be more evident. For example, had the University employed Stewart as an independent contractor, rather than a salaried employee, and the theft impaired or prevented Stewart from fulfilling his contractual obligation to the University, then pecuniary, or economic, injury could be established. However, Stewart clearly received his salary. And furthermore, the State failed to show any demonstrable pecuniary damages, just an inconvenience.

While Stewart has certainly been inconvenienced, section § 77-38a-302 of the Utah Code does not provide restitution for inconveniences, but rather pecuniary damage only. (R. 81: 23-27). Section § 77-38a-102(6) specifically addresses possible *economic injury* and specifically excludes “punitive or exemplary damages and pain and suffering.”

Stewart has suffered no economic harm, but merely an inconvenience of time. Thus, restitution for that inconvenience falls under the category of punitive, exemplary damages and/or pain and suffering.

Here, however, Stewart suffered no harm other than an inconvenience to renew his teaching materials. Unlike Brown, Harvell, Mast and the other cases, Stewart did not suffer damages that are economically calculable. In those cases, the victims alleged out-of-pocket expenses/costs due to the defendant's criminal activity. Here, Stewart suffered no out-of-pocket expenses, nor did he suffer any other economic injury, as he was paid his same salary. As such, the trial court erred in concluding that Stewart suffered pecuniary damages and ordering restitution in the amount of \$9,758.00.

II. The Trial Court Erred by Ordering Restitution for Criminal Activity that Birkeland Neither Admitted To, Pled Guilty To or Agreed To Pay

“A court may order restitution only if the defendant has been convicted of a crime that resulted in pecuniary damages and agrees to pay restitution *or* admits to the criminal conduct.” State v. Watson, 1999 UT App 273, ¶ 3, 987 P.2d 1289 (emphasis in original). This rule is also clearly set forth by statute: “When a defendant is convicted of criminal activity that has resulted in pecuniary damages..., the court shall order that the defendant make restitution to victims of crime... or for conduct for which the defendant has agreed to make restitution as part of a plea disposition.” Utah Code Ann. § 77-38a-302(1). Thus, Birkeland must have either agreed to the restitution or admitted to the harm alleged. Birkeland did neither.

Here, Birkeland entered a plea of no contest to theft, a class A misdemeanor according to the value of the item taken (valued at least \$300 but less than \$1,000). (R. 27-20); see, Utah Code Ann. § 76-6-412(1)(c). Also, the record is clear that Birkeland did not agree to pay restitution in this matter. (R. 27-20; 81: 20-21). Thus, restitution could only be possible based on the first clause of Utah Code Annotated § 77-38a-302(1) – Birkeland’s “criminal activity that has resulted in pecuniary damages....”

“‘Criminal activities’ means any offense of which the defendant is convicted or any other criminal conduct for which the defendant admits responsibility to the sentencing court with or without an admission of committing the criminal conduct. Utah Code Ann. § 77-38a-102(2). First, to the latter part of the definition, at no point did Birkeland admit responsibility to the trial court, even with or without admitting commission of the conduct. In fact, Birkeland’s exchange with the prosecutor emphasizes that point:

PROSECUTOR: Okay. Mr. Beirkeland (sic), what are your thoughts about what you heard Mr. Stewart say about the economic injury that he alleges to have incurred?

BIRKELAND: Well, depends. I don’t know how far I can speak into that.

PROSECUTOR: Okay.

BIRKELAND: To what level. I didn’t plead guilty. I pled no contest. I’m the one that reported the computer. He didn’t report the computer stolen at all. Ever.

PROSECUTOR: Okay.

BIRKELAND: So I have a lot of objections, but I don't know how far I can go into that.

(R. 81: 21).

Second, Birkeland plead no contest to theft of the computer, a class A misdemeanor, never having admitted to tampering or damaging files stored on that computer. (R. 27-20). The trial court is limited in its power to impose restitution, in that it may only order restitution for the *criminal activity* a defendant is convicted of. See, Utah Code Ann. §§ 77-38a-302(1) and 77-38a-102(2) (emphasis added). Birkeland's no contest plea to theft, a class A misdemeanor, admits to only having deprived Stewart of the computer, not damaging it. See, Utah Code Ann. § 76-6-404. This Court addressed this very issue in State v. Watson, 1999 UT App 273, 987 P.2d 1289 (per curium).

In Watson, the defendant was charged with criminal homicide, attempted criminal homicide and obstruction of justice for having driven her co-defendant from the crime scene. Watson, 1999 UT App 273, ¶ 2. Through plea bargaining, Watson pled guilty to attempted obstruction of justice and was ordered, over her objection, to pay restitution relating to the death of one of the victims. Watson, 1999 UT App 273, ¶ 2. This Court's analysis rested on the fact that a trial court must "focus on admissions made to the sentencing court[;] [i]n other words, the statute requires that responsibility for the criminal conduct be firmly established, much like a guilty plea, before the court can order restitution. Watson, 1999 UT App 273, ¶ 5. In conclusion, this Court held that a trial court cannot make inferences about admissions, but must strictly rely on either the defendant's admissions or plea. Watson, 1999 UT App 273, ¶ 5.

Similarly, this Court reached the same conclusion in State v. Mast, 2001 UT App 402, 40 P.3d 1143. In Mast, the defendant was charged with forgery and theft by receiving stolen property. Mast, 2001 UT App 402, ¶ 5. Defendant eventually pled guilty to theft by receiving and admitted having taken only certain property items, which were returned, valued at \$1020.00. Mast, 2001 UT App 402, ¶ 5. As part of her sentence, the trial court ordered that she pay restitution in the amount of \$5090, which was the total value of property, along with other costs incurred, alleged to have been taken from the victim. Mast, 2001 UT App 402, ¶ 5. Defendant objected to this restitution amount because she was only claiming responsibility for particular items, not the entire amount of harm alleged to have been incurred by the victim. Mast, 2001 UT App 402, ¶ 6.

Ultimately, this Court, like in Watson, held that the restitution order was erroneous. Mast, 2001 UT App 402, ¶ 16. This Court found that although a burglary had occurred and impacted the victim, it was a “crime for which defendant was not convicted and for which she admitted no responsibility.” Thus, this Court held that the defendant could not “be held responsible for the other stolen items that remained missing[.]” and vacated the restitution order. Mast, 2001 UT App 402, ¶¶ 16, 19; see also, State v. Brickley, 2002 UT App 342, ¶ 12, 60 P.3d 582 (holding that restitution was improper because the defendant did not admit responsibility for all of the harm to the victim alleged to have occurred).

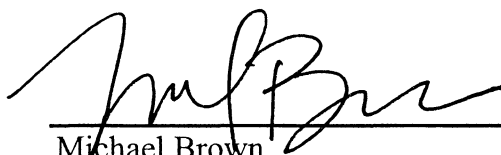
Presently, the restitution order against Birkeland is based on nearly identical facts as those in Mast and Watson. Here, Birkeland plead no contest to the theft of a laptop computer, only. Birkeland never admitted to damaging any programs or files stored on

that computer, nor was such restitution part of his plea agreement. (R. 27-20). As such, the trial court, much like in Watson, was left to make inferences about whether Birkeland was the one responsible for damaging files stored on that laptop.¹ Without statements from Birkeland clearly admitting to the destruction or damage of the files stored on the laptop computer, the trial court had no authority to order restitution in the amount of \$9838.00. (R. 68; 66).

CONCLUSION AND RELIEF SOUGHT

Because the trial court committed error in its interpretation and ultimate application of the law, in that no pecuniary damage occurred and Birkeland did not agree to pay or admit to damaging the files/documents on the laptop computer, Birkeland respectfully requests that this Court reverse the trial court's restitution order of \$9,838.00.

RESPECTFULLY SUBMITTED this 14th day of April, 2010.

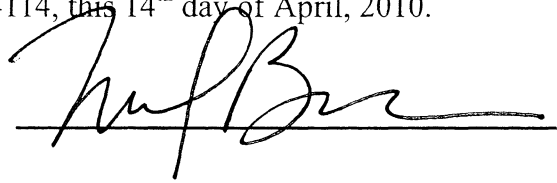


Michael Brown
Margaret P. Lindsay
Counsel for Appellant

¹ The theft of the laptop computer, under Utah Code Ann. § 76-6-402, is a completely separate and distinct criminal act from damaging the electronic contents of that computer, much like the criminal offenses the defendants were charged with in State v. Mast, 2001 UT App 402, and State v. Watson, 1999 UT App 273. Thus, the State's failure to prove Birkeland committed the damage, which could have appropriately been charged under Utah Code Ann. § 76-6-102 as Criminal Mischief, cannot be overlooked in ordering restitution for criminal activity not admitted to or convicted of.

CERTIFICATE OF MAILING

I hereby certify that I delivered two true and correct copies of the foregoing Brief of Appellant to Utah Attorney General, Appeals Division, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, UT 84114, this 14th day of April, 2010.



ADDENDA

CWest's Utah Code Annotated Currentness

Title 77. Utah Code of Criminal Procedure

[Ⓝ] Chapter 38A. Crime Victims Restitution Act (Refs & Annos) [Ⓝ] Part 1. General Provisions

→ § 77-38a-102. Definitions

As used in this chapter:

(1) "Conviction" includes a:

- (a) judgment of guilt;
- (b) a plea of guilty; or
- (c) a plea of no contest.

(2) "Criminal activities" means any offense of which the defendant is convicted or any other criminal conduct for which the defendant admits responsibility to the sentencing court with or without an admission of committing the criminal conduct.

(3) "Department" means the Department of Corrections.

(4) "Diversion" means suspending criminal proceedings prior to conviction on the condition that a defendant agree to participate in a rehabilitation program, make restitution to the victim, or fulfill some other condition.

(5) "Party" means the prosecutor, defendant, or department involved in a prosecution.

(6) "Pecuniary damages" means all demonstrable economic injury, whether or not yet incurred, which a person could recover in a civil action arising out of the facts or events constituting the defendant's criminal activities and includes the fair market value of property taken, destroyed, broken, or otherwise harmed, and losses including lost earnings and medical expenses, but excludes punitive or exemplary damages and pain and suffering.

(7) "Plea agreement" means an agreement entered between the prosecution and defendant setting forth the special terms and conditions and criminal charges upon which the defendant will enter a plea of guilty or no contest.

(8) "Plea in abeyance" means an order by a court, upon motion of the prosecution and the defendant, accepting a plea of guilty or of no contest from the defendant but not, at that time, entering judgment of conviction against him nor imposing sentence upon him on condition that he comply with specific conditions as set forth in a plea in abeyance agreement.

(9) "Plea in abeyance agreement" means an agreement entered into between the prosecution and the defendant setting forth the specific terms and conditions upon which, following acceptance of the agreement by the court, a plea may be held in abeyance.

(10) "Plea disposition" means an agreement entered into between the prosecution and defendant including diversion, plea agreement, plea in abeyance agreement, or any agreement by which the defendant may enter a plea in any other jurisdiction or where charges are dismissed without a plea.

(11) "Restitution" means full, partial, or nominal payment for pecuniary damages to a victim, including prejudgment interest, the accrual of interest from the time of sentencing, insured damages, reimbursement for payment of a reward, and payment for expenses to a governmental entity for extradition or transportation and as may be further defined by law.

(12)(a) "Reward" means a sum of money:

(i) offered to the public for information leading to the arrest and conviction of an offender; and

(ii) that has been paid to a person or persons who provide this information, except that the person receiving the payment may not be a codefendant, an accomplice, or a bounty hunter.

(b) "Reward" does not include any amount paid in excess of the sum offered to the public.

(13) "Screening" means the process used by a prosecuting attorney to terminate investigative action, proceed with prosecution, move to dismiss a prosecution that has been commenced, or cause a prosecution to be diverted.

(14)(a) "Victim" means any person whom the court determines has suffered pecuniary damages as a result of the defendant's criminal activities.

(b) "Victim" may not include a codefendant or accomplice.

CREDIT(S)

Laws 2001, c. 137, § 3, eff. April 30, 2001; Laws 2003, c. 278, § 2, eff. May 5, 2003; Laws 2005, c. 96, § 3, eff. May 2, 2005.

Current through 2009 General Session and 2009 First Special Session

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CWest's Utah Code Annotated Currentness

Title 77. Utah Code of Criminal Procedure

▣ Chapter 38A. Crime Victims Restitution Act (Refs & Annos)

▣ Part 3. Restitution Requirements

→ § 77-38a-302. Restitution criteria

(1) When a defendant is convicted of criminal activity that has resulted in pecuniary damages, in addition to any other sentence it may impose, the court shall order that the defendant make restitution to victims of crime as provided in this chapter, or for conduct for which the defendant has agreed to make restitution as part of a plea disposition. For purposes of restitution, a victim has the meaning as defined in Subsection 77-38a-102(14) and in determining whether restitution is appropriate, the court shall follow the criteria and procedures as provided in Subsections (2) through (5).

(2) In determining restitution, the court shall determine complete restitution and court-ordered restitution.

(a) "Complete restitution" means restitution necessary to compensate a victim for all losses caused by the defendant.

(b) "Court-ordered restitution" means the restitution the court having criminal jurisdiction orders the defendant to pay as a part of the criminal sentence at the time of sentencing or within one year after sentencing.

(c) Complete restitution and court-ordered restitution shall be determined as provided in Subsection (5).

(3) If the court determines that restitution is appropriate or inappropriate under this part, the court shall make the reasons for the decision part of the court record.

(4) If the defendant objects to the imposition, amount, or distribution of the restitution, the court shall allow the defendant a full hearing on the issue.

(5)(a) For the purpose of determining restitution for an offense, the offense shall include any criminal conduct admitted by the defendant to the sentencing court or to which the defendant agrees to pay restitution. A victim of an offense that involves as an element a scheme, a conspiracy, or a pattern of criminal activity, includes any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.

(b) In determining the monetary sum and other conditions for complete restitution, the court shall consider all relevant facts, including:

(i) the cost of the damage or loss if the offense resulted in damage to or loss or destruction of property of a victim of the offense;

(ii) the cost of necessary medical and related professional services and devices relating to physical or mental health care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(iii) the cost of necessary physical and occupational therapy and rehabilitation;

(iv) the income lost by the victim as a result of the offense if the offense resulted in bodily injury to a victim;

(v) up to five days of the individual victim's determinable wages that are lost due to theft of or damage to tools or equipment items of a trade that were owned by the victim and were essential to the victim's current employment at the time of the offense; and

(vi) the cost of necessary funeral and related services if the offense resulted in the death of a victim.

(c) In determining the monetary sum and other conditions for court-ordered restitution, the court shall consider the factors listed in Subsections (5)(a) and (b) and

(i) the financial resources of the defendant and the burden that payment of restitution will impose, with regard to the other obligations of the defendant;

(ii) the ability of the defendant to pay restitution on an installment basis or on other conditions to be fixed by the court;

(iii) the rehabilitative effect on the defendant of the payment of restitution and the method of payment; and

(iv) other circumstances which the court determines may make restitution inappropriate.

(d)(i) Except as provided in Subsection (5)(d)(ii), the court shall determine complete restitution and court-ordered restitution, and shall make all restitution orders at the time of sentencing if feasible, otherwise within one year after sentencing.

(ii) Any pecuniary damages that have not been determined by the court within one year after sentencing may be determined by the Board of Pardons and Parole.

(e) The Board of Pardons and Parole may, within one year after sentencing, refer an order of judgment and commitment back to the court for determination of restitution.

CREDIT(S)

Laws 2001, c. 137, § 8, eff. April 30, 2001; Laws 2002, c. 35, § 13, eff. May 6, 2002; Laws 2002, c. 185, § 51, eff. May 6, 2002; Laws 2003, c. 285, § 1, eff. May 5, 2003; Laws 2005, c. 96, § 5, eff. May 2, 2005.

Current through 2009 General Session and 2009 First Special Session

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FILED

JUL 20 2009

4TH DISTRICT
STATE OF UTAH
UTAH COUNTY

Debbie Hill (8201)
UTAH COUNTY PUBLIC DEFENDER ASSOCIATION
Attorney for Defendant
51 S. University Avenue, Ste. 206
Provo, Utah 84601
Telephone: 801-852-1070

IN THE FOURTH DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

STATE OF UTAH,	:	
	:	
Plaintiff,	:	FINDINGS OF FACT, CONCLUSIONS OF
	:	LAW AND ORDER
vs.	:	
	:	Case No. 081402001
MICHAEL BIRKELAND	:	
	:	Judge Claudia Laycock
Defendant.	:	

On July 1, 2009, this matter came before the Court for the purpose of restitution. The Plaintiff was represented by Assistant Utah County Attorney Craig Johnson. Defendant was present and represented by counsel, Debbie Hill. The Court, having received memoranda from both parties, and having received testimony at both the January 14, 2009 and July 1, 2009 evidentiary hearings, does hereby make and enter the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. On October 22, 2008, the Defendant entered a no contest plea to theft, a class A misdemeanor. This plea was based on the theft of a laptop computer supplied by Utah Valley University to Professor Perry Stewart as part of his employment. Defendant was sentenced on November 19, 2008, at which time a restitution hearing was scheduled for January 14, 2009.
2. At the January 14, 2009 evidentiary hearing, Mr. Stewart testified that although the laptop

computer was returned, several programs and documents, representing his work product, had been deleted and otherwise corrupted. He testified that Utah Valley University paid MacDocs \$80.00 to try to restore the documents, but that he had to put in several hours, approximately 950 hours, to restore his documents, power-point presentations, syllabi and lesson plans. Mr. Perry testified that he is salaried, earning \$64,000 a year. The State requested \$47,580.00 in restitution, arguing that Mr. Perry was entitled to this sum as it represented the approximate 950 hours he spent, both at work and at home, restoring and recreating his lost work.

3. The Court finds that because Mr. Perry's request for restitution includes hours spent at home and at work, where he was being paid by Utah Valley University, he is entitled to a percentage of the 950 hours. Therefore, the Court allows 25% of the hours requested, a total of 238 hours. Furthermore, the Court finds that Mr. Perry's hourly wage, based on a salary of \$64,000.00, for a nine month contract, is \$41.00 per hour. Multiplying the 238 hours by \$41.00 results in a complete restitution amount of \$9758.00 to Mr. Perry, with an additional \$80.00 to Utah Valley University for its payment to MacDocs.

4. On July 1, 2009, Defendant testified as to his ability to pay the proposed restitution amount. Defendant testified that he was self employed, business was slow, and that he earned approximately \$1500.00 a month. Defendant testified that he does not have an advanced degree. He testified that he pays child support of \$1200.00 a month and has a student loan balance of \$24,000.00, which he pays at \$320.00 month. The Court finds that although Defendant's business is currently slow, he has the ability to work, and, therefore, the ability to pay the complete restitution amount. The Court ordered restitution is \$9758.00 to Mr. Perry and \$80.00 to Utah Valley University.

CONCLUSIONS OF LAW


In Defendant's Objection to Proposed Order for Restitution, the defendant argued that Mr. Perry did not suffer pecuniary damage as defined in Utah Code Ann. § 77-38a-102(6). However, the defendant focused only on the language addressing fair market value, lost earnings and medical expenses. The defendant's argument is invalid because it ignores the language in the statute which defines pecuniary damage as economic injury which could be recovered in a civil action. The Court finds that the amount requested by Mr. Perry could be recovered in a civil action. Furthermore, the defendant incorrectly treats the statute's language as exclusionary, not inclusive. The Court finds that the only items excluded by the statute are punitive or exemplary damages and pain and suffering, not the request made by Mr. Perry.

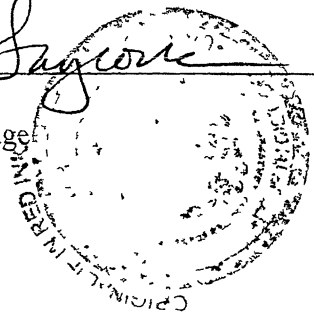
The defendant also argued that the conduct to which he entered a no contest plea does not meet the definition of "criminal activity," as defined in U.C.A. § 77-38-102(2), sufficient to order the degree of restitution requested by the state. The defendant argued that U.C.A. § 77-38-102(2) defines criminal activity as "any offense of which the defendant is convicted or any other criminal conduct for which the defendant admits responsibility to the sentencing court with or without an admission of committing the criminal conduct." The defendant argued that he plead no contest to a class A misdemeanor, and, therefore, was not convicted of a crime exceeding a value amount of \$1000.00. The Court denies the defendant's argument.

ORDER

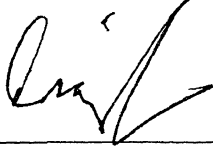
Based on foregoing Findings of Fact and Conclusions of Law the Court orders restitution in the amount of \$9838 00, with \$9758 00 to be paid to Mr Perry Stewart and \$80 00 to be paid to Utah Valley University

Signed this 20th day of July, 2007


Claudia Laycock
District Court Judge



Approved as to form



Craig Johnson
Deputy Utah County Attorney

CERTIFICATE OF HAND DELIVERY

I hereby certify that I caused to be mailed postage prepaid a copy of the foregoing Findings of Fact, Conclusions of Law, and Order to the Utah County Attorney, 100 East Center, Suite 2100, Provo, UT 84606 this 15 day of July, 2009.

Michelle Neal



UTAH VALLEY UNIVERSITY

ART & VISUAL COMMUNICATIONS

To Whom it may concern:

RE: Restitution request in case State of Utah vs. Michael Birkeland
CA#: F08-1607

The defendant- Michael Birkeland, upon stealing the computer proceeded to delete information from it, replacing files and software as if it were going to be his own personal computer. Which I'm sure was his intent.

An attempt was made to recover missing files, documents, spreadsheets and presentations from the hard drive. The computer was taken to Macdocs in Orem, the information they could recover was saved to a file on the desktop. Between 300 and 400 hours have been spent opening and reviewing data from the hard drive. There are still a little over 1300 to be opened and reviewed. Many of the files could not be opened, they had become corrupted. I teach art at UVU, since art is visual I had in most cases 10- 30 power point lecture/presentations per class. Over the past few years at UVU, I have taught the following courses:

1. drawing I
2. 2-d design
3. 3-d design
4. drawing II
5. color theory
6. drawing for illustration
7. illustrative media and techniques I
8. illustrative media and techniques II
9. figure drawing
10. figure structure
11. drawing for animation
12. illustration I
13. illustration II
14. interpretive drawing
15. rendering the human head
16. advanced illustration

The power point presentations which were corrupted are in number 38. I recovered 27 files and saved them. There are several others that weren't recoverable. It is possibly due



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to the length of time it had been since they were opened or I had last taught the class. I think a very reasonable estimate would be 80 presentations, though I am sure it is

probably more in the range of 100. Estimating a modest guess of 10 presentations per class, which would be 160 total, those recovered (27), those corrupted (38) and those lost (80). I have or will have nearly 120 presentations to redo. On average one presentation

takes easily 6 hours to create and organize many of them are more time involved than that. Making calculations easy, lets say I have 100 presentations either recreated or have still yet to recreate. I will need to invest or have invested 600 hours for only the powerpoint presentations. I make over \$50/hour and think it fair that I calculate my time and worth accordingly. The calculations, come to 600 (hours) x \$50/hour = \$30,000.

Also missing were Syllabi for each of the classes, assignments (weekly or bi-weekly), lecture notes and thousands of images collected for lectures. The past summer was spent, searching through files, trying to remember key words and remaking files that were missing and corrupted. There were multiple thousands of files that were opened renamed and saved or deleted. The majority of which were junk files that needed to be deleted. But, I had to open every file check it, review it and do something with it. I have lost nearly 18 years of material in many cases. Should it have been backed up? Yes without question, on the other hand it shouldn't have been stolen, information deleted, my entire life as a professor was wiped from the computer. The task of going through thousands of files, recreating syllabi and assignments, recollecting research, data and examples should be considered as well. I estimate that in the past months since losing my files I have spent a minimum of 350 hours recreating syllabi, course content and lectures in addition to the power point presentations. There are still probably another couple hundred to go. I am calculating 350 hours x \$50/hour = \$17,500.

The combination of the two $\$30,000 + \$17,500 = \$47,500$. These are the damages I am seeking, again this is a moderate estimate of the time I have already spent and will continue to spend over the next few years, recreating my files, documents and presentations.

As another item for consideration, I have a daughter 15 years old and one 19 years old who both live at home. Without their involvement, I would yet be missing a computer and Mr. Birkeland would probably not have been arrested. When he was arrested they were quite proud of themselves for helping put a thief in jail. When he posted bail and was out pending his court appearance, one daughter would not sleep with her window ajar at night, nor would she sleep with her bedroom door closed. Even now she refuses to close her bedroom door for fear that Michael Birkeland will somehow get through her bedroom window and kill her or rape her for helping in his arrest. He has caused



UTAH VALLEY UNIVERSITY

ART & VISUAL COMMUNICATIONS

incredible anxiety and fear in the lives of my daughters. Thank you for the consideration of my request to have a bit restored for all that is tumultuous and lost in this series of events.

Sincerely,

Perry Stewart
4491 Oxford Street
Cedar Hills, Utah 84062
801-492-9544 home
801-863-7132 office

FILED
Fourth Judicial District Court
of Utah County, State of Utah
Deputy 10/22/08

IN THE Fourth JUDICIAL DISTRICT COURT
Utah COUNTY, STATE OF UTAH

STATE OF UTAH, : STATEMENT OF DEFENDANT
Plaintiff, : ~~IN SUPPORT OF GUILTY PLEA~~
: AND CERTIFICATE OF COUNSEL

vs. : Case No. 091401001

Michael Burkhead :
Defendant. :

I, Michael Burkhead hereby acknowledge and certify that I have been advised of and that I understand the following facts and rights:

Notification of Charges

I am pleading guilty (or no contest) to the following crimes:

	Crime & Statutory Provision	Degree	Punishment Min/Max and/or Minimum Mandatory
A.	<u>Drugs</u>	<u>MA</u>	<u>1 yr. UCJ \$2500</u>
B.			
C.			
D.			

I have received a copy of the (Amended) Information against me. I have read it, or had it read to me, and I understand the nature and the elements of crime(s) to which I am pleading guilty (or no contest).

The elements of the crime(s) to which I am pleading guilty (or no contest) are:

- In Utah County
- On 4/31/2008
- I took unauthorized control
- over the property of another
- with the intent to deprive
- value of said property by 300-1000

I understand that by pleading guilty I will be admitting that I committed the crimes listed above. (Or, if I am pleading no contest, I am not contesting that I committed the foregoing crimes). I stipulate and agree (or, if I am pleading no contest, I do not dispute or contest) that the following facts describe my conduct and the conduct of other persons for which I am criminally liable. These facts provide a basis for the court to accept my guilty (or no contest) pleas and prove the elements of the crime(s) to which I am pleading guilty (or no contest):

In Utah County on 4/31/08,
one State will present evidence
that I took a lead top without
authorization valued at 300-1000

Waiver of Constitutional Rights

I am entering these pleas voluntarily. I understand that I have the following rights under the constitutions of Utah and of the United States. I also understand that if I plead guilty (or no contest) I will give up all the following rights:

Counsel: I know that I have the right to be represented by an attorney and that if I cannot afford one, an attorney will be appointed by the court at no cost to me. I understand

that I might later, if the judge determined that I was able, be required to pay for the appointed lawyer's service to me.

I (have not) (have) waived my right to counsel. If I have waived my right to counsel, I have done so knowingly, intelligently, and voluntarily for the following reasons:

If I have waived my right to counsel, I certify that I have read this statement and that I understand the nature and elements of the charges and crimes to which I am pleading guilty (or no contest). I also understand my rights in this case and other cases and the consequences of my guilty (or no contest) plea(s).

If I have not waived my right to counsel, my attorney is Nicholas Hill. My attorney and I have fully discussed this statement, my rights, and the consequences of my guilty (or no contest) plea(s).

Jury Trial. I know that I have a right to a speedy and public trial by an impartial (unbiased) jury and that I will be giving up that right by pleading guilty (or no contest).

Confrontation and cross-examination of witnesses. I know that if I were to have a jury trial, a) I would have the right to see and observe the witnesses who testified against me and b) my attorney, or myself if I waived my right to an attorney, would have the opportunity to cross-examine all of the witnesses who testified against me.

Right to compel witnesses. I know that if I were to have a jury trial, I could call witnesses if I chose to, and I would be able to obtain subpoenas requiring the attendance and testimony of those witnesses. If I could not afford to pay for the witnesses to appear, the State would pay those costs.

Right to testify and privilege against self-incrimination. I know that if I were to have a jury trial, I would have the right to testify on my own behalf. I also know that if I chose not to testify, no one could make me testify or make me give evidence against myself. I also know that if I chose not to testify, the jury would be told that they could not hold my refusal to testify against me.

Presumption of innocence and burden of proof. I know that if I do not plead guilty (or no contest), I am presumed innocent until the State proves that I am guilty of the charged crime(s). If I choose to fight the charges against me, I need only plead "not guilty," and my case will be set for a trial. At a trial, the State would have the burden of proving

each element of the charge(s) beyond a reasonable doubt. If the trial is before a jury, the verdict must be unanimous, meaning that each juror would have to find me guilty.

I understand that if I plead guilty (or no contest), I give up the presumption of innocence and will be admitting that I committed the crime(s) stated above.

Appeal. I know that under the Utah Constitution, if I were convicted by a jury or judge, I would have the right to appeal my conviction and sentence. If I could not afford the costs of an appeal, the State would pay those costs for me. I understand that I am giving up my right to appeal my conviction if I plead guilty (or no contest).

I know and understand that by pleading guilty, I am waiving and giving up all the statutory and constitutional rights as explained above.

Consequences of Entering a Guilty (or No Contest) Plea

Potential penalties. I know the maximum sentence that may be imposed for each crime to which I am pleading guilty (or no contest). I know that by pleading guilty (or no contest) to a crime that carries a mandatory penalty, I will be subjecting myself to serving a mandatory penalty for that crime. I know my sentence may include a prison term, fine, or both.

I know that in addition to a fine, an eighty-five percent (85%) surcharge will be imposed. I also know that I may be ordered to make restitution to any victim(s) of my crimes, including any restitution that may be owed on charges that are dismissed as part of a plea agreement.

Consecutive/concurrent prison terms. I know that if there is more than one crime involved, the sentences may be imposed one after another (consecutively), or they may run at the same time (concurrently). I know that I may be charged an additional fine for each crime that I plead to. I also know that if I am on probation or parole, or awaiting sentencing on another offense of which I have been convicted or which I have plead guilty (or no contest), my guilty (or no contest) plea(s) now may result in consecutive sentences being imposed on me. If the offense to which I am now pleading guilty occurred when I was imprisoned or on parole, I know the law requires the court to impose consecutive sentences unless the court finds and states on the record that consecutive sentences would be inappropriate.

00024

Plea bargain. My guilty (or no contest) plea(s) (is/are) (is/are not) the result of a plea bargain between myself and the prosecuting attorney. All the promises, duties, and provisions of the plea bargain, if any, are fully contained in this statement including those explained below:

I agree to plead no contest to
credited Court I, a class
A medium or

Trial judge not bound. I know that any charge or sentencing concession or recommendation of probation or suspended sentence, including a reduction of the charges for sentencing, made or sought by either defense counsel or the prosecuting attorney are not binding on the judge. I also know that any opinions they express to me as to what they believe the judge may do are not binding on the judge.

Defendant's Certification of Voluntariness

I am entering this plea of my own free will and choice. No force, threats, of unlawful influence of any kind have been made to get me to plead guilty (or no contest). No promises except those contained in this statement have been made to me.

I have read this statement, or I have had it read to me by my attorney, and I understand its contents and adopt each statement in it as my own. I know that I am free to change or delete anything contained in this statement, but I do not wish to make any changes because all of the statements are correct.

I am satisfied with the advice and assistance of my attorney.

I am 37 years of age. I have attended school through the college grade. I can read and understand the English language. If I do not understand English, an interpreter has been provided to me. I was not under the influence of any drugs, medication, or intoxicants which would impair my judgment when I decided to plead guilty. I am not presently under the influence of any drug, medication, or intoxicants which impair my judgment.

I believe myself to be of sound and discerning mind and to be mentally capable of understanding these proceedings and the consequences of my plea. I am free of any mental disease, defect, or impairment that would prevent me from understanding what I am doing or from knowingly, intelligently, and voluntarily entering my plea.

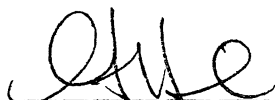
I understand that if I want to withdraw my guilty (or no contest) plea(s), I must file a written motion to withdraw my plea(s) before I have been sentenced and final judgment has been entered. I will only be allowed to withdraw my plea if I show good cause. I will not be allowed to withdraw my plea after sentence has been announced.

Dated this 22 day of Oct. 2008.


DEFENDANT

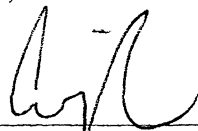
Certificate of Defense Attorney

I certify that I am the attorney for Michael Birkeland, the defendant above, and that I know he/she has read the statement or that I have read it to him/her; I have discussed it with him/her and believe that he/she fully understands the meaning of its contents and is mentally and physically competent. To the best of my knowledge and belief, after an appropriate investigation, the elements of the crime(s) and the factual synopsis of the defendant's criminal conduct are correctly stated; and these, along with the other representations and declarations made by the defendant in the foregoing affidavit, are accurate and true.


ATTORNEY FOR DEFENDANT
Bar No. 95001

Certificate of Prosecuting Attorney

I certify that I am the attorney for the State of Utah in the case against _____
_____, defendant. I have reviewed this Statement of Defendant
and find that the factual basis of the defendant's criminal conduct which constitutes the
offense(s) is true and correct. No improper inducements, threats, or coercion to encourage
a plea has been offered defendant. The plea negotiations are fully contained in the
Statement and in the attached Plea Agreement or as supplemented on the record before the
Court. There is reasonable cause to believe that the evidence would support the conviction
of defendant for the offense(s) for which the plea(s) is/are entered and that the acceptance
of the plea(s) would serve the public interest.



PROSECUTING ATTORNEY

Bar No. 10151

00021

Order

Based on the facts set forth in the foregoing Statement and the certification of the defendant and counsel, and based on any oral representations in court, the Court witnesses the signatures and finds that defendant's guilty (or no contest) plea(s) is/are freely, knowingly, and voluntarily made.

IT IS HEREBY ORDERED that the defendant's guilty (or no contest) plea(s) to the crime(s) set forth in the Statement be accepted and entered.

Dated this 22nd day of Oct., 2008

Claudia Gray
DISTRICT COURT JUDGE

