1994

State of Utah v. Charles David Wright : Brief of Appellee

Utah Court of Appeals

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UTAH

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	.A10 DOCKET NO. 940568 CA
Plaintiff-Appellee,	:	Case No. 940568-CA
v.	:	Priority No. 2
CHARLES DAVID WRIGHT,	:	
Defendant-Appellant.	:	

BRIEF OF APPELLEE

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DEFENDANT'S APPEAL OF SENTENCE FOR ATTEMPTED POSSESSION OF AN INCENDIARY DEVICE, A THIRD DEGREE FELONY IN VIOLATION OF UTAH CODE ANN. §§ 76-4-102(3), 76-10-306(3) (1995), ENTERED BY THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, UTAH, THE HONORABLE MICHAEL R. MURPHY, PRESIDING.

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ORAL ARGUMENT REQUESTED

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BRIEF OF APPELLEE

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JURISDICTION AND NATURE OF PROCEEDINGS

Defendant Charles David Wright (Wright) appeals his sentence for attempted possession of an incendiary device, a third degree felony in violation of Utah Code Ann. §§ 76-4-102(3), 76-10-306(3) (1995). The challenged zero-to-five-years prison sentence was entered in the Third Judicial District Court, in and for Salt Lake County, Utah, the Honorable Michael R. Murphy, presiding. This Court has appellate jurisdiction under Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1994).

ISSUE PRESENTED ON APPEAL AND STANDARD OF APPELLATE REVIEW

May a trial court reconsider an orally-announced but unwritten criminal sentence, and impose a sentence more stringent than originally announced, consistent with the double jeopardy prohibition against multiple punishment for the same offense? This question entails questions of rule, statute, and constitutional interpretation, all subject, in this case, to nondeferential appellate review of the trial court's judgment. *E.g.*, *State v.*

Rio Vista Oil, Ltd., 786 P.2d 1343, 1347 (Utah 1990); *State v. Mitchell*, 824 P.2d 469, 471 (Utah App. 1991).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The Fifth Amendment to the United States Constitution states in pertinent part, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . .." Utah's statutory double jeopardy provision, Utah Code Ann. § 77-1-6(2)(a) (1995), similarly states, "No person shall be put twice in jeopardy for the same offense[.]" *Accord* UTAH CONST. Art. I, § 12. Rule 22, Utah Rules of Criminal Procedure, and rules 54, 58A, and 81, Utah Rules of Civil Procedure, are copied in the appendix to this brief.

STATEMENT OF THE CASE

Wright was charged with possession of an incendiary device, a second degree felony under Utah Code Ann. § 76-10-306 (1995) (formerly "infernal machine," Utah Code Ann. §§ 76-10-306 through -308 (1990)) (R. 8-9). Through plea bargaining, he pleaded guilty to attempted possession of an incendiary device, a third degree felony by operation of Utah Code Ann. § 76-4-102(3) (1995). After orally announcing that Wright would be placed on probation (R. 77-79), the trial court reconsidered, and sentenced him to zero-to-five years at the Utah State Prison--the allowable term for a third degree felony, Utah Code Ann. § 76-3-203(3) (1995) (R. 38-39, 94). Wright appeals that stricter sentence.

STATEMENT OF FACTS

The facts of the underlying crime are gleaned from the charging information and from statements at the several trial court hearings in this case. Wright and a friend

exploded a home-made pipe bomb in the friend's back yard (R. 9, 75-76, 90-91). Startled neighbors called the police, precipitating Wright's arrest and prosecution.

The facts critical to this appeal involve the process by which Wright received the challenged zero-to-five-years prison sentence for his "little fire works" (R. 77). When Wright pleaded guilty, on 23 May 1994, to attempted possession of an incendiary device, he acknowledged the trial court's warning that he could receive a zero-to-five year prison sentence, even if the State recommended leniency (R. 61-62). The trial court then ordered a presentence report from the Department of Adult Probation and Parole (A.P. & P.), and set sentencing for 20 June 1994 (R. 32, 63-65).[1]

However, A.P. & P. was mistakenly informed that the state of Iowa intended to extradite Wright on other charges. Therefore, A.P. & P. had not prepared a presentence report in advance of the 20 June sentencing hearing (R. 33, 69). Based upon that development, the trial court re-ordered the presentence report, and continued sentencing to 11 July 1994 (with an alternative 01 August date). The court also suggested that defense counsel might then persuade the court to sentence Wright without benefit of a presentence report (R. 33, 70).

On 11 July 1994, Wright appeared for sentencing, although the presentence report still had not been completed (R. 73). The trial court expressed concern about the lack of a presentence report; however, defense counsel urged the court to sentence Wright without the report (R. 73-74). The prosecutor agreed that Wright could be placed on probation (R.

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[1]The trial court had some information about Wright's criminal history, but desired more complete information; the court therefore requested a presentence report (R. 63-64).

75-77). Accordingly, the trial court announced that it would suspend Wright's prison term for the pleaded-to crime, and impose thirty-six months of probation, to include a twelve month jail sentence plus payment of a fine, surcharge, and possible restitution. Jail release would be possible upon subsequent confirmation that Wright was employed (R. 77-79).

That orally-announced sentence was never reduced to writing. Instead, on 18 July 1994--one week after its oral announcement of probation--the trial court convened another brief hearing (R. 97-103). The court explained that because it had not received the presentence report before the 11 July hearing, it had not signed the commitment order placing Wright on probation:

> As I proceeded with sentencing last week, I misunderstood that there was in fact a presentence report on the way. And in fact, if you recall, I was a bit in wonderment of why I only had effectively a statement of the criminal history of the defendant, rather than a complete presentence report.
>
> It was only after the entire calendar that Mr. Wilson indicated to me that there was a presentence report being prepared, and it just wasn't completed. Because I was informed of that, I did not sign the judgment. And as far as I'm concerned there is no judgment, there is no sentence until I sign those papers.
>
> The oral hearing and the court's statement at oral hearing is the statement of what the court intends to do upon the preparation of the papers. I now revoke what I intended to do, and we'll have a new sentencing hearing based on this presentence report that has now been completed and submitted to me today.

(R. 98-99). The trial court therefore continued sentencing to 01 August 1994 (R. 101).

On 01 August, Wright did not appear in court due to an apparent scheduling glitch with jail transportation officers. However, through counsel, Wright proffered mental

health information that he believed pertinent to sentencing (R. 105). Accordingly, the trial court again continued sentencing, to 29 August 1994 (R. 106).

At the 29 August hearing, Wright argued, through counsel, that the earlier, orally-announced sentence was binding, and that double jeopardy and due process principles barred the court from imposing a stricter sentence than it had announced (R. 82-84). The trial court rejected that argument: "[M]y imposition of sentence occurs finally after I do that orally, then I sign the papers. I have not signed any papers" (R. 82). The court reviewed the confusion and delay in obtaining the presentence report, reiterating its decision to revoke its original oral sentence announcement, in order to sentence Wright with the aid of a complete presentence report (R. 84-86).

The trial court then reviewed the presentence report with Wright, and with an A.P. & P. representative, giving attention to Wright's mental health history as therein reported (R. 88-91). Rejecting an A.P. & P. recommendation of jail time, and finding no treatment facility available to address Wright's uncertain mental health needs, the trial court sentenced him to zero-to-five years at the state prison (R. 38, 92-95). Because Wright had remained in jail since the initial oral sentence announcement, the court credited that jail time against his prison sentence (R. 94-95). This sentence was reduced to writing, signed and filed (R. 38). On appeal, Wright continues his double jeopardy-based challenge to the zero-to-five-years prison sentence.

SUMMARY OF ARGUMENT

The trial court's ruling that no sentence was imposed by its initial, oral sentencing announcement is correct under Utah law. Case law and the Utah criminal and

civil procedure rules hold that no sentence or judgment exists until it is signed and entered by the court. Contrary federal authority addresses due process concerns that are not present in this case. Because no sentence was imposed by the trial court's initial, oral announcement, there was no double jeopardy bar to the court's subsequent decision, duly signed and entered, to sentence Wright to a prison term.

ARGUMENT

BECAUSE THE TRIAL COURT'S ORAL ANNOUNCEMENT OF PROBATION HAD NO LEGAL EFFECT UNDER UTAH LAW, THERE WAS NO DOUBLE JEOPARDY BAR TO WRIGHT'S SUBSEQUENT WRITTEN PRISON SENTENCE

Wright correctly states that constitutional and statutory double jeopardy principles bar "multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); *State v. Holland*, 777 P.2d 1019, 1023 (Utah 1989); *see* U.S. CONST. amend. V; UTAH CONST. art. I § 12; Utah Code Ann. § 77-1-6(2)(a) (1995). He argues that the trial court punished him twice for attempted possession of an incendiary device, violating double jeopardy, by first orally stating that probation would be granted, but then subsequently committing him to prison.

Wright's argument depends upon his premise that the trial court's initial oral announcement that he would receive probation, never reduced to writing, constituted "punishment" (E.g., Br. of Appellant at 8 ("the court lawfully imposed sentence;" *id.* at 13-14 (oral statement about probation was a "lawful sentence")). As the trial court correctly held (R. 82), that premise is false.

Under Utah law, there is no sentence, and hence no "punishment," until a criminal judgment is entered in writing. *See State v. Gerrard*, 584 P.2d 885, 886 (Utah

1978) (trial court's oral statement that ninety-day presentence evaluation would be sought, never reduced to writing, was properly rescinded after defendant's attempted escape); *State v. Curry*, 814 P.2d 1150 (Utah App. 1991) (trial court's concurrent sentence statement, never reduced to writing, was properly rescinded, and consecutive sentences imposed, following presentence evaluation requested by defendant). This Court stated, in *Curry*: "[T]he oral statement from the court regarding defendant's sentence was not reduced to writing, and thus defendant's sentence was not entered until September 7, 1990 [(i.e., after the ninety-day evaluation)]." *Curry*, 814 P.2d at 1151.[2] Like the defendants in *Gerrard* and *Curry*, Wright has only been punished once for his offense--under the trial court's final, duly written and entered sentence. Therefore, he has no double jeopardy claim.

This result is in accord with Utah's criminal procedural rules. Notwithstanding Wright's protestations (Br. of Appellant at 20), rule 22, Utah Rules of Criminal Procedure, clearly contemplates that a criminal sentence must be entered in written form. That directive is readily apparent from rule 22(d), which requires the trial court to "issue its commitment setting forth the sentence," and then requires the officer delivering the defendant to confinement to "deliver a true copy of the commitment to the jail or prison and [to] make his return on the commitment and file it with the court." Clearly, those acts

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[2]That result, this Court observed, was consistent with *Hinkins v. Santi*, 25 Utah 2d 324, 481 P.2d 53 (1971), holding that a judgment is not final until entered in written form. *Curry*, 814 P.2d at 1151. In *Hinkins*, the supreme court dismissed the defendant's appeal from an oral sentence for contempt of court, holding that no appeal could lie from a non-written order. *Accord Combs v. Turner*, 25 Utah 2d 397, 483 P.2d 437, 440 (1971) (sentence is final when "pronounced and recorded on the docket" (quoting authority)).

require a written sentence, or commitment: they cannot be performed upon a mere oral sentence announcement.

If needed, further clarification of the requirement that a sentence be entered in written form comes from Utah's civil procedure rules, which "also govern in any aspect of criminal proceedings where there is no other applicable statute or rule, provided, that any rule so applied does not conflict with any statutory or constitutional requirement." Utah R. Civ. P. 81(e). Under the civil rules, a judgment must be signed and filed to be valid. Rule 54(a), Utah Rules of Civil Procedure, states that a civil judgment "includes a decree and any order from which an appeal lies." In turn, civil rule 58A(a) through -(c) prescribes that a judgment is "entered," and final, only when signed by the trial judge (or court clerk in certain instances) and filed. *Accord Hinkins v. Santi*, 25 Utah 2d 324, 481 P.2d 53, 54 (1971) (oral sentence statement is not an appealable order); *Newton v. State Road Comm'n*, 23 Utah 2d 350, 463 P.2d 565, 567 (1970) (court's oral statements "are superseded by the formal written findings and judgment"); *McCollum v. Clothier*, 241 P.2d 468, 472 (Utah 1952) ("[N]o antecedent expressions of the judge can in any way restrict his absolute power to declare his final conclusion, in the only manner authorized by law, to wit, by filing his 'decision' . . ." (quoting authority)). Thus by operation of civil rule 81(e), a criminal judgment has no legal effect until it is signed and filed. In this case, because the trial court's initial sentencing announcement was never thus entered in written form, it had no effect.[3]

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[3]Several cases from other jurisdictions also support this result. *E.g.*, *State v. Mason*, 833 P.2d 1058, 1061-62 (Mont. 1992) (rejecting double jeopardy argument of type raised by Wright); *State v. Rushing*, 103 N.M. 344, 706 P.2d 875, 876-77 (N.M. App.) (same), *cert. denied*, 103 N.M. 344, 707 P.2d 552 (N.M. 1985).

The remaining inquiry, as indicated by civil rule 81(e), is whether any constitutional provision commands the contrary rule urged by Wright--i.e., that a criminal judgment is final upon its mere oral announcement by a trial court. This case presents no occasion to fashion such a rule. *United States v. Villano*, 816 F.2d 1448 (10th Cir. 1987), relied upon by Wright (Br. of Appellant at 17-21), compels no such rule. By its terms, *Villano* holds that an orally-announced sentence is final and controlling only as a "settled principle of *federal criminal law*," 816 F.2d at 1450 (emphasis added). The states, of course, are not bound to follow federal criminal law in lockstep fashion. And neither *Villano* nor the cases cited therein (cited in Br. of Appellant at 18-20 n.2) opine that states are constitutionally compelled to follow the federal "oral sentence controls" rule as a blanket matter. In fact, by construing Utah law to hold that a criminal sentence has no effect until it is entered in written form, this Court actually avoids the double jeopardy problem raised by Wright in this case. *Cf. State v. Tuttle*, 780 P.2d 1203, 1217 (Utah 1989) (state law should be construed to avoid constitutional infirmities).[4]

To the extent that the federal "oral sentence controls" rule might be constitutionally driven, it applies to different procedural facts from those presented in this case. The federal rule applies to situations wherein a written criminal sentence, without explanation or further hearing, varies from a prior, orally-announced judgment: in such a

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[4]It is doubtful whether Wright would have a double jeopardy claim even if the trial court's oral sentence were considered final. The United States Supreme Court has intimated that "multiple punishments" concerns may not apply to noncapital sentencing at all. *See Caspari v. Bohlen*, ___ U.S. ___, 114 S. Ct. 948, 964-55 (1994) (noting the Court's "traditional refusal to extend the Double Jeopardy Clause to sentencing . . ."); *Lockhart v. Nelson*, 488 U.S. 33, 37-38 n.6 (1988) (expressly reserving the question).

situation, the orally-announced sentence controls. As such, the federal "oral sentence controls" rule is not grounded in double jeopardy principles. Instead, the federal rule enforces the due process requirement of notice and opportunity to be heard regarding sentence. *See Villano*, 816 F.2d at 1452 ("Sentencing should be conducted with the judge and defendant facing one another and not in secret").

Due process requirements were honored in this case. Following the initial oral, unwritten announcement of Wright's sentence, the trial court learned that the twice-ordered presentence report was finally forthcoming. At that point the court, properly desiring to make a fully-informed sentencing decision, promptly set a new sentencing hearing (R. 98-99).[5] At that hearing, Wright, having reviewed the presentence report, reargued his case for probation rather than state prison incarceration (R. 88-91). That satisfied due process. *See State v. Sanwick*, 713 P.2d 707, 709 (Utah 1986); *State v. Rhodes*, 818 P.2d 1048, 1050-51 (Utah App. 1991). Hence the "oral sentence controls" rule advocated by Wright need not, and should not, be applied to this case.

Despite the Utah rule that no sentence exists until it is properly signed and filed, Wright contends that the orally-announced sentence did impose punishment upon him, because he began serving that "sentence" immediately after it was announced (Br. of Appellant at 24-26). However, the mere fact that Wright remained in jail following the oral sentence announcement did not constitute "punishment" for double jeopardy purposes. Instead, that jail time was only an extension of confinement that commonly continues

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[5]*Compare United States v. Earley*, 816 F.2d 1428, 1434 (10th Cir. 1987) (en banc) (in waiting five months to correct written sentence, after defendant had begun to serve it, "[t]he district court acted too late").

between the time a criminal defendant pleads or is found guilty, and the time of sentencing. *See* Utah R. Crim. P. 22(a) ("Pending sentence, the court may commit the defendant or may continue or alter bail or recognizance").[6]

Perhaps some remedy is due to a defendant who is confined for an unreasonable time after an adjudication of guilt, but before sentencing. Under rule 22(a), Utah Rules of Criminal Procedure, Utah criminal defendants have a general (but waivable) expectation of sentencing within thirty days after the guilt finding. Wright was confined for ninety-eight days between entry of his guilty plea and the trial court's written entry of his prison sentence--that is, sixty-eight days longer than rule 22(a) contemplates.

Under the circumstances, Wright received an appropriate remedy for that presentence delay. The mix-up about the presentence report, which caused the initial delay, cannot be attributed to the prosecution or to trial court error. After that mix-up was corrected, a large portion of the subsequent delay--from 01 August to 29 August 1994--was caused by Wright's own request that the trial court consider additional mental health information (R. 37, 105-06). Ultimately, the trial court credited all of Wright's presentence confinement, *plus* his pre-guilty plea confinement, against his prison sentence (R. 38). Wright needs no further remedy, and double jeopardy law ought not be made more tortuous, *cf. Jones v. Thomas*, 491 U.S. 376, 387 (1989), to create a further remedy for him.

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[6]Similarly, when a ninety-day presentence "diagnostic evaluation" (a more elaborate evaluation than occurred in this case) is ordered, the Utah legislature has expressly provided that the confinement for such evaluation "does not constitute a commitment to prison," although credit for time in such confinement is given. *See* Utah Code Ann. § 76-3-404(2) (1995).

In sum, under Utah law and the facts of this case, the "oral sentence" that Wright would have this Court enforce was really no sentence at all. He was only punished once for his offense, when the trial court reconsidered its oral announcement of Wright's sentence upon review of the presentence report, and entered, upon due notice and hearing, a more stringent final sentence. Wright's double jeopardy argument therefore fails.

CONCLUSION

For the foregoing reasons, Wright's criminal sentence should be AFFIRMED.

RESPECTFULLY SUBMITTED this 21 day of June, 1995.

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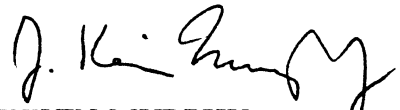
Attorney General



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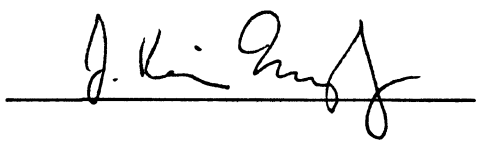
CERTIFICATE OF DELIVERY

I hereby certify that two true and accurate copies of the foregoing brief of appellee were hand-delivered or mailed, postage prepaid, to RONALD S. FUJINO and VERNICE AH CHING, Salt Lake Legal Defender Association, attorneys for defendant-appellant, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111, this 21 day of June, 1995.



APPENDIX

above, which created the Psychiatric Security Review Board, was repealed in 1992.

Cross-References. — Division and Board of Mental Health, § 62A-12-101 et seq.

Hearing on mental condition of defendant found not guilty by reason of insanity, § 77-16a-302.

Pardons and paroles, Title 77, Chapter 27.

Utah State Hospital, § 62A-12-201 et seq.

NOTES TO DECISIONS

ANALYSIS

Constitutionality.
Availability of plea.
Availability of treatment.
Guilty and mentally ill.
Sentence.
—Length.
—Place.

Constitutionality.

Former Subdivisions (4)(c) and (4)(d) were unconstitutional because none of the considerations therein was relevant to the treatment rationale. The application of those provisions to a mentally ill criminal defendant was thus arbitrary and capricious, in violation of the due process guarantee of Utah Const., Art. I, § 7. State v. Copeland, 765 P.2d 1266 (Utah 1988).

Availability of plea.

This rule does not require a defendant to assert a defense of not guilty by reason of insanity as a condition precedent to the availability of a guilty and mentally ill instruction and verdict. State v. Young, 853 P.2d 327 (Utah 1993).

Availability of treatment.

A finding that treatment is available is relevant to a decision to commit a criminal defendant under Subdivision (4). State v. Copeland, 765 P.2d 1266 (Utah 1988).

Guilty and mentally ill.

Uncontroverted evidence of a defendant's mental illness in connection with a finding of guilty requires a trial judge to find the defendant guilty and mentally ill and then determine the appropriate disposition of the defendant, whether it be to prison or to the state hospital. State v. DePlonty, 749 P.2d 621 (Utah 1987).

Sentence.

—Length.

A defendant who is found guilty and mentally ill should be given a sentence of the same duration as any other defendant convicted of the same offense. Committing such a defendant to the state mental hospital does not interrupt or extend the length of the defendant's sentence. State v. DePlonty, 749 P.2d 621 (Utah 1987).

—Place.

Trial court did not err in sentencing defendant to the Utah State Prison instead of the Utah State Hospital, where the court considered the testimony of several witnesses and found that while defendant had established that he had a mental illness as defined by statute, he did not meet the other criteria required for commitment to the state hospital. State v. Anderson, 789 P.2d 27 (Utah 1990); State v. Anderson, 797 P.2d 416 (Utah 1990).

A conviction of guilty and mentally ill does not ipso facto entitle the defendant to be committed to the state hospital rather than the state prison. Whether defendant is entitled to psychiatric treatment as a matter of right is a factual issue. State v. Anderson, 797 P.2d 416 (Utah 1990).

COLLATERAL REFERENCES

Brigham Young Law Review. — Convicting or Confining? Alternative Directions in Insanity Law Reform: Guilty But Mentally Ill Versus New Rules for Release of Insanity Acquittees, 1983 B.Y.U. L. Rev. 499.

A.L.R. — Pyromania and the criminal law, 81 A.L.R.4th 1243.

Probation revocation: insanity as defense, 56 A.L.R.4th 1178.

Nonconsensual treatment of involuntarily committed mentally ill persons with neuroleptic or antipsychotic drugs as violative of state constitutional guaranty, 74 A.L.R.4th 1099.

Instructions in state criminal case in which defendant pleads insanity as to hospital confinement in event of acquittal, 81 A.L.R.4th 669.

Rule 22. Sentence, judgment and commitment.

(a) Upon the entry of a plea or verdict of guilty or plea of no contest, the court shall set a time for imposing sentence which shall be not less than two nor more than 30 days after the verdict or plea, unless the court, with the concurrence of the defendant, otherwise orders. Pending sentence, the court may commit the defendant or may continue or alter bail or recognizance.

Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment, or to show any legal cause why sentence should not be imposed. The prosecuting attorney shall also be given an opportunity to present any information material to the imposition of sentence.

(b) On the same grounds that a defendant may be tried in his absence, he may likewise be sentenced in his absence. If a defendant fails to appear for sentence, a warrant for his arrest may be issued by the court.

(c) Upon a verdict or plea of guilty or plea of no contest, the court shall impose sentence and shall enter a judgment of conviction which shall include the plea or the verdict, if any, and the sentence. Following imposition of sentence, the court shall advise the defendant of his right to appeal and the time within which any appeal shall be filed.

(d) When a jail or prison sentence is imposed, the court shall issue its commitment setting forth the sentence. The officer delivering the defendant to the jail or prison shall deliver a true copy of the commitment to the jail or prison and shall make his return on the commitment and file it with the court.

(e) The court may correct an illegal sentence, or a sentence imposed in an illegal manner, at any time.

Cross-References. — Pre-sentence investigation, § 76-3-404.

Rules of evidence inapplicable to sentencing and probation proceedings, Rule 1101, U.R.E.

Suspending imposition of sentence and placing defendant on probation, § 77-18-1.

NOTES TO DECISIONS

ANALYSIS

Advising defendant of right to appeal.

Trial court's failure to again advise defendant of his right to appeal at sentencing was harmless error where trial court had informed him of such right at the trial and after the verdict, and he did not object to the timeliness of the court's advice. Crowe v. State, 649 P.2d 2 (Utah 1982).

Illegal sentence.

A district court may reassume jurisdiction to correct an erroneous and void sentence, irrespective of the time limits. State v. Lee Lim, 79 Utah 68, 7 P.2d 825 (1932).

Defendant must first ask the trial court to correct his sentence if he believes that it has been imposed in an illegal manner. State v. Brooks, 230 Utah Adv. Rep. 33 (Utah Ct. App. 1994).

Jurisdiction.

Because an illegal sentence is void, the court does not lose jurisdiction over the sentence until the sentence has been corrected; however, once a court imposes a valid sentence, it loses subject matter jurisdiction over the case. State v. Montoya, 825 P.2d 676 (Utah Ct. App. 1991).

Sentences.

—Habitual offenders.

A justice of the peace, after imposing a fine for drunkenness for violation of a city ordinance, could not thereafter impose a jail sentence under those provisions of ordinance providing for cumulative punishment for a second or subsequent offense, without taking evidence upon the question of the previous conviction. Ex parte Mulliner, 101 Utah 51, 117 P.2d 819 (1941).

—Indefinite suspension of sentence.

The court, by indefinitely suspending sentence, and permitting defendant to go on his own recognizance, lost jurisdiction of him, so that it could not afterwards have him rearrested, and sentence him. In re Flint, 25 Utah 338, 71 P. 531, 95 Am. St. R. 853 (1903).

Sentencing hearing.

—Continued hearing.

Failure to advise accused of nature of the charge, his plea and the verdict thereon at a sentencing proceeding which was a continuation of a prior sentence hearing was not reversible error where defendant was adequately apprised of that information in the initial proceeding, although it would have been preferable for defendant to have been advised of those facts in the continued proceeding. State v. McClendon, 611 P.2d 728 (Utah 1980).

—Evidence.

——Delinquency record.

A record of delinquency is not admissible in the guilt phase of a trial even though it is relevant and material to the issues, but the limitation goes only to the use of the delinquency record as "evidence" and is not a bar to consideration in the sentencing phase of a criminal case. State v. McClendon, 611 P.2d 728 (Utah 1980).

——Polygraph examination.

The trial court did not abuse its discretion in refusing to consider at sentencing the results of the polygraph examination offered by the defendant, who claimed that the test was pertinent to the ultimate question of his guilt, because the issue of defendant's guilt was already

when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) **Draft report.** Before filing his report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

(f) **Objections to appointment of master.** A party may object to the appointment of any person as a master on the same grounds as a party may challenge for cause any prospective trial juror in the trial of a civil action. Such objections must be heard and disposed of by the court in the same manner as a motion.

(Amended effective Jan. 1, 1987.)

Compiler's Notes. — This rule is similar to Rule 53, F.R.C.P.

Cross-References. — Challenging of jurors for cause, U.R.C.P. 47(f).

NOTES TO DECISIONS

ANALYSIS

Report.
—Failure to object.
——Waiver.
Scope of appointment.
Status as judicial officer.

Report.

—Failure to object.

——Waiver.

One who made no objection to master's report as required by this rule could not question the report for the first time on appeal from district court order adopting the master's findings. Score v. Wilson, 611 P.2d 367 (Utah 1980).

Scope of appointment.

A special master who was directed to review requests for cost reimbursements exceeded the scope of his appointment by investigating and reporting on the issue of attorney's fees since the court had already ordered an award of attorney's fees and the parties had no notice that the master was to review that award nor did the parties have an opportunity to participate in the master's proceedings. Plumb v. State, 809 P.2d 734 (Utah 1990).

Status as judicial officer.

A special master has the duties and obligations of a judicial officer, and thus should not engage in unethical ex parte contacts with the judge overseeing the case on matters pertinent to the substance of the referral. Plumb v. State, 809 P.2d 734 (Utah 1990).

COLLATERAL REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d Equity §§ 226, 228; 66 Am. Jur. 2d References §§ 1 et seq., 30 et seq.

C.J.S. — 30A C.J.S. Equity §§ 515, 520, 521 to 528, 532, 533, 535, 537, 539 et seq.; 76 C.J.S. References §§ 7 et seq., 60 to 110, 122 et seq.

A.L.R. — Bankruptcy, right of creditor who has not filed timely petition for review of referee's order to participate in appeal secured by another creditor, 22 A.L.R.3d 914.

Power of successor or substituted master or referee to render decision or enter judgment on testimony heard by predecessor, 70 A.L.R.3d 1079.

Referee's failure to file report within time specified by statute, court order, or stipulation as terminating reference, 71 A.L.R.4th 889.

What are "exceptional conditions" justifying reference under Rule of Civil Procedure 53(b), 1 A.L.R. Fed. 922.

Key Numbers. — Equity ⇐ 393 to 395, 401, 404 to 406; Reference ⇐ 3 et seq., 35 to 77, 99 et seq.

PART VII.
JUDGMENT.

Rule 54. Judgments; costs.

(a) **Definition; form.** "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment need not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) **Judgment upon multiple claims and/or involving multiple parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determina-

tion and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for judgment.

(1) Generally. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. It may be given for or against one or more of several claimants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between or among themselves.

(2) Judgment by default. A judgment by default shall not be different in kind from, or exceed in amount, that specifically prayed for in the demand for judgment.

(d) Costs.

(1) To whom awarded. Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; provided, however, where an appeal or other proceeding for review is taken, costs of the action, other than costs in connection with such appeal or other proceeding for review, shall abide the final determination of the cause. Costs against the state of Utah, its officers and agencies shall be imposed only to the extent permitted by law.

(2) How assessed. The party who claims his costs must within five days after the entry of judgment serve upon the adverse party against whom costs are claimed, a copy of a memorandum of the items of his costs and necessary disbursements in the action, and file with the court a like memorandum thereof duly verified stating that to affiant's knowledge the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding. A party dissatisfied with the costs claimed may, within seven days after service of the memorandum of costs, file a motion to have the bill of costs taxed by the court in which the judgment was rendered.

A memorandum of costs served and filed after the verdict, or at the time of or subsequent to the service and filing of the findings of fact and conclusions of law, but before the entry of judgment, shall nevertheless be considered as served and filed on the date judgment is entered.

(3), (4) [Deleted.]

(e) Interest and costs to be included in the judgment. The clerk must include in any judgment signed by him any interest on the verdict or decision from the time it was rendered, and the costs, if the same have been taxed or ascertained. The clerk must, within two days after the costs have been taxed or ascertained, in any case where not included in the judgment, insert the amount thereof in a blank left in the judgment for that purpose, and make a similar notation thereof in the register of actions and in the judgment docket. (Amended effective January 1, 1985.)

Amendment Notes. — Subdivisions (d)(3) and (d)(4), relating to the award of costs by the appellate court and costs in original proceedings before the Supreme Court, were repealed with the adoption of the Utah Rules of Appellate Procedure, effective January 1, 1985. See, now, Rule 34(d), Utah R.App.P.

Compiler's Notes. — This rule is similar to Rule 54, F.R.C.P.

Cross-References. — Continuances, discretion to require payment of costs, U.R.C.P. 40(b).

Judges' retirement fee, taxing as costs, § 49-6-301.

State, payment of costs awarded against, § 78-27-13.

Stay of judgment upon multiple claims, U.R.C.P. 62(h).

Witness fees, taxing as costs, § 21-5-8.

NOTES TO DECISIONS

Cited in Oil Shale Corp. v. Larson, 20 Utah 2d 369, 438 P.2d 540 (1968).

COLLATERAL REFERENCES

Am. Jur. 2d. — 22A Am. Jur. 2d Declaratory Judgments §§ 183, 186, 203 et seq.

C.J.S. — 26 C.J.S. Declaratory Judgments §§ 17, 18, 104, 155.

A.L.R. — Right to jury trial in action for declaratory relief in state court, 33 A.L.R.4th 146.

Key Numbers. — Declaratory Judgment ⇐ 41, 42, 251, 367.

Rule 58A. Entry.

(a) **Judgment upon the verdict of a jury.** Unless the court otherwise directs and subject to the provisions of Rule 54(b), judgment upon the verdict of a jury shall be forthwith signed by the clerk and filed. If there is a special verdict or a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49, the court shall direct the appropriate judgment which shall be forthwith signed by the clerk and filed.

(b) **Judgment in other cases.** Except as provided in Subdivision (a) hereof and Subdivision (b)(1) of Rule 55, all judgments shall be signed by the judge and filed with the clerk.

(c) **When judgment entered; notation in register of actions and judgment docket.** A judgment is complete and shall be deemed entered for all purposes, except the creation of a lien on real property, when the same is signed and filed as herein above provided. The clerk shall immediately make a notation of the judgment in the register of actions and the judgment docket.

(d) **Notice of signing or entry of judgment.** The prevailing party shall promptly give notice of the signing or entry of judgment to all other parties and shall file proof of service of such notice with the clerk of the court. However, the time for filing a notice of appeal is not affected by the notice requirement of this provision.

(e) **Judgment after death of a party.** If a party dies after a verdict or decision upon any issue of fact and before judgment, judgment may nevertheless be rendered thereon.

(f) **Judgment by confession.** Whenever a judgment by confession is authorized by statute, the party seeking the same must file with the clerk of the court in which the judgment is to be entered a statement, verified by the defendant, to the following effect:

(1) If the judgment to be confessed is for money due or to become due, it shall concisely state the claim and that the sum confessed therefor is justly due or to become due;

(2) If the judgment to be confessed is for the purpose of securing the plaintiff against a contingent liability, it must state concisely the claim and that the sum confessed therefor does not exceed the same;

(3) It must authorize the entry of judgment for a specified sum.

The clerk shall thereupon endorse upon the statement, and enter in the judgment docket, a judgment of the court for the amount confessed, with costs of entry, if any.

(Amended effective Sept. 4, 1985; Jan. 1, 1987.)

Advisory Committee Note. — Paragraph (d) is intended to remedy the difficulties suggested by *Thompson v. Ford Motor Co.*, 14 Utah 2d 334, 384 P.2d 109 (1963).

Compiler's Notes. — The subject matter of this rule is dealt with in Rules 58 and 79(a), F.R.C.P.

Cross-References. — Judgment against person dying after verdict or decision, not a lien on realty, § 78-22-1.1.

Judgment by confession authorized, § 78-22-3.

Opening default or default judgment claimed to have been obtained because of attorney's mistake as to time or place of appearance, trial, or filing of necessary papers, 21 A.L.R.3d 1255.

Validity and construction of constitution or statute authorizing exclusion of public in sex offense cases, 39 A.L.R.3d 852.

Right of accused to have press or other media representatives excluded from criminal trial, 49 A.L.R.3d 1007.

Power of court to impose standard of personal appearance or attire, 73 A.L.R.3d 353.

What amounts to "appearance" under statute or rule requiring notice, to party who has "appeared," of intention to take default judgment, 73 A.L.R.3d 1250.

Applicability of judicial immunity to acts of clerk of court under state law, 34 A.L.R.4th 1186.

Key Numbers. — Clerks of Courts ⇐ 24, 66; Courts ⇐ 61 et seq.; Judgment ⇐ 276; Motions ⇐ 57; Trial ⇐ 5, 20.

Rules 78 to 80. Repealed.

Repeals. — Rule 78, relating to motion day, Rule 79, relating to books and records kept by the clerk, and Rule 80, relating to reporters and record transcripts, were repealed by order of the Supreme Court, effective May 1, 1991.

PART XI.
GENERAL PROVISIONS.

Rule 81. Applicability of rules in general.

(a) Special statutory proceedings. These rules shall apply to all special statutory proceedings, except insofar as such rules are by their nature clearly inapplicable. Where a statute provides for procedure by reference to any part of the former Code of Civil Procedure, such procedure shall be in accordance with these rules.

(b) Probate and guardianship. These rules shall not apply to proceedings in uncontested probate and guardianship matters, but shall apply to all proceedings subsequent to the joinder of issue therein, including the enforcement of any judgment or order entered.

(c) Procedure in city courts and justice courts. These rules shall apply to civil actions commenced in the city or justice courts, except insofar as such rules are by their nature clearly inapplicable to such courts or proceedings therein.

(d) On appeal from or review of a ruling or order of an administrative board or agency. These rules shall apply to the practice and procedure in appealing from or obtaining a review of any order, ruling or other action of an administrative board or agency, except insofar as the specific statutory procedure in connection with any such appeal or review is in conflict or inconsistent with these rules.

(e) Application in criminal proceedings. These rules of procedure shall also govern in any aspect of criminal proceedings where there is no other applicable statute or rule, provided, that any rule so applied does not conflict with any statutory or constitutional requirement.

City courts. — Former § 78-4-32, as enacted by L. 1977, ch. 77, § 1, transferred the jurisdiction and powers of the city courts to the municipal departments of the circuit courts. For circuit court jurisdiction generally, see Title 78, Chapter 4.

Cross-References. — Administrative Rulemaking Act, § 63-46a-1 et seq.

Circuit courts generally, § 78-4-1 et seq.

Justice courts generally, § 78-5-101 et seq.

Uniform Probate Code, Title 75.

NOTES TO DECISIONS

Analysis

Administrative proceedings.
City and justices' courts.
Criminal proceedings.
Special statutory proceedings.
Cited.

Administrative proceedings.

The Utah Rules of Civil Procedure are inapplicable to a proceeding before an administrative body seeking to regulate activities burdened with a public interest. Entre Nous Club v. Toronto, 4 Utah 2d 98, 287 P.2d 670 (1955).

Rule 6(e) is not inconsistent with, nor clearly inapplicable to, the procedure of the Industrial Commission and therefore supplements the procedure of the Commission. Griffith v. Industrial Comm'n, 16 Utah 2d 264, 399 P.2d 204 (1965).

Where road commission's order that sign be