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Recommended Citation
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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee, :

vs. : Case No. 20020079-CA

JOSE JAVALA-PEREZ, :
Defendant/Appellant.

BRIEF OF APPELLEE

An appeal from convictions for one count of Driving Under the Influence, a Class B Misdemeanor, one count of Speeding, a Class C Misdemeanor, one count of Faulty Equipment, a Class C Misdemeanor, in the Third District Court, Salt Lake County, the Honorable William W. Barrett, presiding.

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FILED
Utah Court of Appeals
AUG 19 2002
Paulette Stagg
Clerk of the Court

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Defendant/Appellant.
:

BRIEF OF APPELLEE

JURISDICTION AND NATURE OF THE PROCEEDINGS

This is an appeal from convictions for one count of Driving Under the Influence, a Class B Misdemeanor, in violation of UTAH CODE ANN. § 41-6-44 (2000), one count of Speeding, a Class C Misdemeanor, in violation of UTAH CODE ANN. § 41-6-46 (2000), and one count of Faulty Equipment, a Class C Misdemeanor, in violation of UTAH CODE ANN. § 41-6-117 (2000), in the Third District Court, the Honorable William W. Barrett presiding.

This Court has jurisdiction pursuant to UTAH CODE ANN. § 78-2a-3(2)(e) (1999).

STATEMENT OF THE FIRST ISSUE, STANDARD OF REVIEW, AND PRESERVATION OF THE ARGUMENT

Issue: When the defendant fails to maintain contact with his attorney and the court, as ordered by the court, is a bench trial in absentia proper?

Standard of Review. Whether a defendant is properly tried in absentia is a question of law, which this Court reviews for correctness. See *State v. Anderson*, 929 P.2d 1107, 1108 (Utah 1996) (citing *State v. Pena*, 869 P.2d 932, 936 (Utah 1994)).

Preservation of the Issue. This issue is preserved on the record at R. 17-20, 24-33, and 53 [1].

STATEMENT OF THE SECOND ISSUE, STANDARD OF REVIEW, AND PRESERVATION OF THE ARGUMENT

Issue: When a defendant fails to maintain contact with his defense attorney for three months prior to his trial date, does he waive his right to a jury trial?

Standard of Review. This Court review a trial court's legal determinations nondeferentially for correctness. See *State v. Pena*, 869 P.2d 932, 936 (Utah 1994).

Preservation. This issue was preserved on the record at R. 17-20, 24-33, and 53 [1].

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The following statutes, rules, or constitutional provisions whose interpretation is relevant to this appeal are attached at addendum A:

Utah Constitution, Article I, Section 10
Utah Constitution, Article I, Section 12
Utah Rules of Criminal Procedure, Rule 3 (2002)
Utah Rules of Criminal Procedure, Rule 24 (2002)

STATEMENT OF THE CASE

On March 1, 2001, the State charged the defendant by information with one count of Driving Under the Influence, a Class B Misdemeanor, in violation of UTAH CODE ANN. § 41-6-44 (1998), one count of Speeding, a Class C Misdemeanor, in violation of UTAH CODE ANN. § 41-6-46 (1998), and one count of Faulty Equipment, a Class C Misdemeanor, in violation of UTAH CODE ANN. § 41-6-117 (1998) . R. 2-3.

On May 24, 2001, defendant appeared at his arraignment at which time the court appointed the Salt Lake Legal Defenders Association. R. 7 A pre-trial conference was scheduled for June 18, 2001. R. 7 and Docket Page 2[1]. At the pre-trial conference, with the assistance of a Spanish interpreter, a jury trial was scheduled for September 12, 2001 in front of Judge Barrett. R. 11. Defendant failed to maintain contact with his attorney or the court since his initial pre-trial conference and so a jury was not called. The defendant appeared in court on September 12, 2001, but because of the defendant's failure to maintain contact, the jury trial was stricken and Judge Barrett scheduled a bench trial for October 29, 2001. R. 13 & Docket Page 4. On October 26, 2001, defense counsel requested a continuance and the court rescheduled the bench trial for November 29, 2001. Docket Page 4. Defense counsel filed a Motion to Strike Bench Trial and Demand for Trial by Jury, along with memorandum in support of the motion. Docket Page 4. The

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1 The docket in this case is contained in the Court of Appeals record, but was not numbered as part of the record. The State cites to the docket as part of the record pursuant to Utah Rules of Appellate Procedure Rule 11(a) which specifically states the

motion was denied. R. 53[1]. On November 26, 2001, the defendant failed to appear for his bench trial, and the court tried the defendant in absentia. At the conclusion of the trial, Judge Dever found defendant guilty as charged. R. 53[36]. Judge Dever sentenced the defendant to the statutory terms. R. 34. Defendant timely appealed. R. 37.

STATEMENT OF THE FACTS[2]

On February 17th, 2001, about 7:30 a.m., Utah Highway Patrol Trooper Clark observed the defendant speeding and drifting out of his lane on California Avenue. R. 53[2-3] Trooper Clark stopped the defendant and administered field sobriety tests, which the defendant failed.

A warrant for the defendant's arrest was issued. R.4. On March 6, 2001, the defendant was notified by mail of his arraignment date. R. 5-6. On May 24, 2001, defendant appeared at his arraignment at which time the Salt Lake Legal Defenders Association was appointed and a pre-trial conference was scheduled for June 18, 2001. R. 7 and Docket Page 2. The court instructed the defendant to immediately contact the Salt Lake Legal Defender Association, and to keep them advised at all times of an address and a telephone number where the defendant could be reached. Docket Page 3. On June 18, 2001, the defendant was present at a pre-trial conference in front of Judge William W.

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docket sheet is part of the record on appeal in all cases.

[2]Except as otherwise noted, this brief recites the facts in the light most favorable to the [] verdict. *See State v. Litherland,* 2000 UT 76, ¶ 2, 12 P.3d 92.

Barrett. Docket Page 3. With the assistance of a Spanish interpreter, the defendant scheduled a jury trial for September 12, 2001 in front of Judge Barrett. R. 11.

On September 12, 2001, the defendant appeared in court for his scheduled trial. Docket Page 4. However, the court specifically noted that the defendant had not maintained contact with his attorney prior to showing up that day. Docket Page 4. In the presence of the prosecuting attorney and defense counsel, the jury trial was stricken and a bench trial was scheduled for October 29, 2001. R. 13 & Docket Page 4. On October 26, 2001, the defense attorney requested a continuance of the bench trial to file a motion to strike the bench trial. A new bench trial was rescheduled for November 26, 2001. Docket Page 4. On November 20, 2001, the defense's motion to strike the scheduled bench trial and demand a jury trial, along with memorandum in support of the motion were entered with the court. Docket Page 4. The motion was denied. R. 53[1]. On November 26, 2001, the prosecutor, prosecution witnesses, and the defense attorney were present in the courtroom. R. 53[2]. The three prosecution witnesses had traveled from Santaquin, San Pete County, and Weber County on three different occasions. R. 53[2].

The defendant failed to appear for trial. R. 53[1]. The defense attorney represented to the court that he was charged with informing his client of the new date of trial. R. 53[1]. Furthermore, the Spanish interpreter at his office had been attempting to contact the defendant and had "left numerous messages of the new court date." R. 53[1]. Defense counsel stated that up until the Wednesday prior to the Monday trial, the defendant had not

contacted him. R. 53[1]. When defense counsel returned from the Thanksgiving weekend on Monday morning, he had some messages from the defendant. R. 53[1]. Defense counsel attempted to contact the defendant but was unable to reach him. R. 53[1]. The court proceeded with the bench trial and the defendant was tried in absentia in front of Judge L.A. Dever. R. 53[2].

The State called Trooper Sterling Clark who testified regarding the stop and field sobriety tests he administered to the defendant. R. 53[2-25]. Trooper Clark testified that when he stopped the defendant he took a picture ID from the defendant, and the name on the ID was Jose Perez. R. 53[24]. Defense counsel cross-examined Trooper Clark regarding the reliability of field sobriety tests and how he administered the tests to the defendant. R. 53[8-24]. Next, the State called Trooper Roy Carlson. R. 53[25]. Trooper Carlson testified he administered a breathalyzer test to the defendant, but the test came back with an insufficient sample because the defendant did not blow hard enough. R. 53[25-29]. Defense counsel cross-examined Trooper Carlson. R. 53[28-29].

At the conclusion of the evidence, Judge Dever found the defendant guilty as charged.

SUMMARY OF THE ARGUMENT

The trial court properly conducted a bench trial in the defendant's absence because the defendant was knowingly and voluntarily absent. The defendant in a criminal trial has the right to appear and defend in person at all stages of trial under

article I § 12 of the Utah Constitution and Utah Code Ann. § 77-1-6(1)(a) (1999). *See State v. Wagstaff*, 772 P.2d 987, 989 (Utah 1989); accord *State v. Houtz*, 714 P.2d 677, 678 (Utah 1986)(per curiam). However, that right may be waived "if the defendant voluntarily absents himself from trial." *State v. Houtz*, 714 P.2d at 678; *accord State v. Wagstaff*, 772 P.2d at 989-990. The State has the burden to show the voluntariness of the defendant's absence, *State v. Ross*, 655 P.2d 641, 642 (Utah 1982)(per curiam). However, once the State has demonstrated that the defendant had notice, absent a showing from the defendant to the contrary, an inference of voluntariness is permissible when the defendant fails to show.

Utah courts have held that "[n]otice served upon a party's attorney of record is sufficient to satisfy statutory notice requirements." *State v. Wagstaff*, 772 P.2d at 991. Courts have found notice to the defendant's attorney sufficient because "[i]t is the responsibility of an out-of-custody defendant to remain in contact with his or her attorney and with the court." *State v. Wagstaff*, 772 P.2d at 990 (*quoting State v. Love*, 711 P.2d 1240, 1243 (Ariz.App.1985)). The courts have refused to find lack of notice where a defendant failed to maintain contact with the court or his attorney.

From the record, it cannot be determined whether the defendant had actual notice of the trial date. He was not present when the bench trial set for October 29, 2001 was continued. However, even assuming the defendant did not have actual notice of the bench trial date, any claim that he lacked notice is insufficient since his attorney did

have notice and he failed to maintain contact with his attorney. The first jury trial was stricken specifically because the defendant failed to maintain contact with his attorney. Docket Page 4.

The State concedes that the defendant does have a right to a jury trial. Under Utah's statutory scheme, the defendant asserted the right to a jury trial, but his failure to comply with his known duty to maintain contact with his attorney effectively waived that statutory right.

ARGUMENT

POINT I

THE IN ABSENTIA BENCH TRIAL OF THE DEFENDANT WAS PROPER BECAUSE THE DEFENDANT KNOWINGLY AND VOLUNTARY WAIVED HIS RIGHT TO BE PRESENT

Defendant claims his absence from the second scheduled bench trial was neither knowing nor voluntary, so that any waiver of his right to be present was ineffective. Br. Aplt. at 8. Specifically, defendant argues that he did not receive notice of his bench trial, and that the State has failed to show he was voluntarily absent. An accused defendant in a criminal trial has the right to appear and defend in person at all stages of trial under article I § 12 of the Utah Constitution and Utah Code Ann. § 77-1-6(1)(a) (1999). *See State v. Wagstaff*, 772 P.2d 987, 989 (Utah 1989); accord *State v. Houtz*, 714 P.2d 677, 678 (Utah 1986)(per curiam). However, that right may be waived "if the defendant voluntarily absents himself from trial." *State v. Houtz*, 714 P.2d at 678; *accord State v. Wagstaff*, 772

P.2d at 989-990. As acknowledged by defense counsel, Rule 17 of the Utah Rules of Criminal Procedure codifies an accused's right to be present and the requirements necessary to waive that constitutional right. Rule 17(a)(2) states that the defendant shall be personally present at the trial except that for prosecutions not punishable by death, "the defendant's voluntary absence from the trial after notice to defendant of the time for trial shall not prevent the case from being tried." Utah Rules of Criminal Procedure 17(a)(2)(2002). Therefore, if the defendant receives notice of the trial and is voluntarily absent, his right to be present is waived. *See State v. Anderson*, 929 P.2d 1107, 1110 (Utah 1996).

A. Because defense counsel was given notice and was aware of the bench trial for November 26, 2001, the defendant had sufficient notice and the defendant's objection to notice is without merit because he failed to maintain contact with his attorney or the court.

On November 20, 2001, the defendant filed a Motion to Strike Bench Trial and Demand for Trial by Jury. R. 17-20. On November 26, 2001, the trial court denied that motion and held a bench trial in absentia. R. 53[1]. On December 28, 2001, the defendant filed a Motion to Set Aside Verdict and Grant a New Trial, which the trial court denied. R. 24-33.

To meet the notice requirement under the Utah Rules of Criminal Procedure, Utah courts have held that "[n]otice served upon a party's attorney of record is sufficient to satisfy statutory notice requirements." *State v. Wagstaff*, 772 P.2d at 991. Courts have

found notice to the defendant's attorney sufficient because "[i]t is the responsibility of an out-of-custody defendant to remain in contact with his or her attorney and with the court." *State v. Wagstaff*, 772 P.2d at 990 (*quoting State v. Love*, 711 P.2d 1240, 1243 (Ariz.App.1985)). The courts have refused to find lack of notice where a defendant failed to maintain contact with the court or his attorney. In *State v. Anderson*, the court addressed the issue of a defendant who did not have official notice of the date of sentencing and

> concluded that the defendant's "failure to know of the continued dates of his trial and his date of sentencing is directly attributable to his failure to keep in contact with the court and his attorney. A defendant cannot be allowed to keep himself deliberately ignorant and then complain about his lack of knowledge."

State v. Anderson, 929 P.2d at 1110-1111 (*quoting Brewer v. Raines*, 670 F.2d 117, 119 (9th Cir.1982); *see also State v. Wagstaff*, 772 P.2d at 990 (finding where a defendant fails to remain in contact with his attorney and the court, . . . he 'cannot benefit from [his] misconduct by manipulating a rule designed for [his] protection.'" (*quoting State v. Love*, 711 P.2d at 1243))

In this case, defendant had three separate trial dates. The first trial date was set for September 12, 2001 and was a jury trial. R. 11. The defendant had actual notice of that date since he was present at the arraignment when it was scheduled. Docket Page 3-4. On September 12, 2001, the defendant and defense counsel Michael Misner were present when the jury trial was stricken and the October bench trial was scheduled. Docket Page 4.

On October 26, defense counsel requested a continuance and the bench trial was rescheduled for November 26, 2001. Docket Page 4. Although the record is silent as to how notice was given to defense counsel of the new trial date, on November 6, 2001, defense counsel filed a Motion to Strike in which he asked the "Court for an order striking the bench trial currently scheduled for November 26, 2001, and respectfully asks this Court to set this matter for a trial by jury." R. 17. Therefore, the record shows that defense counsel did have notice of the trial date.

From the record, it cannot be determined whether the defendant had actual notice of the trial date. He was not present when the bench trial set for October 29, 2001 was continued. However, even assuming the defendant did not have actual notice of the bench trial date, any claim that he lacked notice is insufficient since his attorney did have notice and he failed to maintain contact with his attorney. The first jury trial was stricken specifically because the defendant failed to maintain contact with his attorney. Docket Page 4. The record is silent as to any communication between defense counsel and defendant regarding the October bench trial. However, the record does indicate that the defendant failed to maintain contact with his attorney for the November trial. Defense counsel told the trial court that the Spanish interpreter at the Legal Defenders office called the defendant and "left numerous messages of the new court date." R. 53[1] As of the Wednesday prior to the Monday trial, the defendant had not contacted the defense attorney. R. 53[1]. When defense counsel returned to work on Monday after the

Thanksgiving weekend, there were messages from the defendant. R. 53[1]. Therefore, any attempt by the defendant to contact his attorney was made at most one business day before trial. When defense counsel again tried to reach the defendant, he could not reach him. R. 53[1]. Defendant failed in his duty to maintain contact with the court and his attorney. He cannot now "benefit from his misconduct" by claiming he did not receive notice.

Additionally, the defendant argues that neither he, nor defense counsel received actual written notice of the trial date as required by Rule 3 of the Utah Rules of Criminal Procedure. Br. Aplt. at 11. However, Utah courts have rejected this argument when made by the attorney or the defendant under similar circumstances to this case. In *State v. Coles*, the defense attorney was notified of the trial date by the defendant, but then argued he was entitled to notice under Rule 3. *State v. Cole*, 688 P.2d 473, 474 (Utah 1984)(per curiam). The court held "that notice was sufficient under the rules." *Id.* In *State v. Wagstaff*, the defendant claimed that although his attorney received notice, he was entitled to notice under Rule 3. 772 P.2d at 991. The court held that notice to the attorney was sufficient to satisfy the rules and "if appellant had performed his duty of maintaining contact with his attorney, he would have had actual notice of the time of trial. Therefore, appellant's objection is without merit." *Id.* In this case, the defense attorney was notified by the court of the new date, and was aware of that date as early as November 6, 2001. Therefore, claims by either the defense attorney or the defendant regarding Rule 3 fail.

In sum, defendant's claim that he did not receive notice lacks merit. The record indicates that defense counsel was aware of the bench trial date of November 26, 2001. Therefore, notice served upon the defense attorney was sufficient to satisfy the statutory notice requirements. Furthermore, any lack of notice was due to defendant's failure to maintain contact with his attorney, which was an obligation of the defendant since he was out of custody. Therefore, the defendant had notice under the codified waiver process in Rule 17 of the Utah Rules of Criminal Procedure.

B. Because the defendant had notice of his upcoming trial, and was out-of-custody, the court properly inferred the defendant was voluntarily absent.

The defendant argues that under *State v. Wanosik*, the state has the "burden to make a preliminary showing that the defendant's absence is voluntary." Br. Aplt. at 13. Specifically, defendant argues that in this case the trial court did not make any findings regarding the defendant's voluntary absence. The Utah Supreme Court held that any waiver of the right to be present must be voluntary, but "if defendant's absence is deliberate without a sound reason, the trial may start in his absence." *State v. Anderson*, 929 P.2d 1107, 1110 (Utah 1996) (*quoting State v. Wagstaff*, 772 P.2d 987, 990 (Utah Ct.App.1989)) A defendant is voluntarily absent when he is free to attend his trial but he does not. *State v. Anderson*, 929 P.2d at 1110. Utah courts have held that a defendant is involuntarily absent when he is incarcerated, *State v. Houtz*, 714 P.2d at 678, comatose in

a hospital, *State v. Wanosik*, 2001 UT App 241, ¶ 19 n. 8, 31 P.3d 615, or acting on the advice of counsel, *State v. Coles*, 688 P.2d 473, 474 (Utah 1984).

The State has the burden to show the voluntariness of the defendant's absence, *State v. Ross*, 655 P.2d 641, 642 (Utah 1982)(per curiam). However, once the State has demonstrated that the defendant had notice, absent a showing from the defendant to the contrary, an inference of voluntariness is permissible when the defendant fails to show. *State v. Anderson*, 929 P.2d at 1110-1111. Such an inference is reasonable and necessary, because, as this court has recognized, "[s]tatistically, the vast majority of court no-shows spaced it out, could not muster the courage or effort to be present, or got sidetracked in some volitional way. Only a tiny minority find themselves comatose or otherwise involuntarily incapacitated at the time of trial or sentencing." *Wanosik*, 2001 UT App 241, ¶ 20 n. 10.

The Utah Supreme Court and this Court applied this inference to determine whether defendants were voluntarily absent from trial and sentencing. In *Anderson*, the Utah Supreme Court cited to *Wagstaff*, a trial-in-absentia case decided by this court, to determine the test for voluntariness. Whether a defendant's absence from trial is voluntary "is determined by considering the totality of the circumstances." *State v. Wagstaff*, 772 P.2d at 990. The Utah Supreme Court applied this test and found that where Anderson knew of the date of his trial, failed to maintain contact with the court or his attorney, and did not argue that he was not at liberty to attend his sentencing, that his absence was

voluntary and operated as a waiver of his right to be present. *State v. Anderson*, 929 P.2d at 1110-1111. In *Wagstaff*, this Court applied the totality test and found "that appellant failed in his duty to maintain contact with his attorney and the court and, thus, cannot benefit by claiming that he was not voluntarily absent from court." *Wagstaff,* 772 P.2d at 990.

This Court's particular holding in *Wanosik*, which presumes a defendant is involuntarily absent and requires the State to show voluntariness by establishing that it has searched for the defendant at his place of employment, jails, or hospitals, conflicts with the established precedent of the Utah Supreme Court in *State v. Anderson*, 929 P.2d 1107 (Utah 1996), *State v. Meyers*, 508 P.2d 41 (Utah 1973), and this Court in *State v. Wagstaff*, 772 P.2d 987 (Utah Ct. App.1989). In *State v. Anderson*, the Utah Supreme Court addressed the defendant's right to be present at sentencing. Anderson was released to pretrial services, but disappeared before trial. Anderson still had not appeared at the time of his sentencing. Anderson did not argue that he was not at liberty to attend his sentencing. The supreme court held that where Anderson offered no argument that he was not at liberty to attend, and he could have had notice if he had maintained contact with his attorney or the court, that his absence was voluntary. *State v. Anderson*, 929 P.2d at 1111.

In *State v. Meyers*, the defendant was released on bail and disappeared after the first day of trial. There was no search for the defendant made by the State. The Utah Supreme Court found that a defendant may waive his right to be present, and noted that "[i]n the

administration of justice a court cannot be rendered helpless and impotent by the devious and cunning ways adopted by the defendant . . . [t]o hold to the contrary would permit a mischievously inclined defendant to profit by his own wrongdoing." 508 P.2d at 42-43.

Finally, in *Wagstaff*, the defendant failed to maintain contact with his attorney, and failed to appear for trial. The defendant filed a motion for a new trial with attached affidavits which asserted he was absent from trial because he feared for his life. Wagstaff argued he was not voluntarily absent because of the threats on his life. This court found that Wagstaff knew his trial was coming up, and then he intentionally left the state, and failed to maintain contact with his attorney or the court. This court found, "that [Wagstaff] failed in his duty to maintain contact with his attorney and the court and, thus, cannot benefit by claiming that he was not voluntarily absent from court." 772 P.2d at 990. This Court cited *State v. Aikers*, 51 P.2d 1052, 1056 (1935) for the policy behind this decision, stating,

> "[i]t is one thing for him to absent himself when he is at liberty and can voluntarily do so, and quite another thing for the court to deprive him of any substantial right . . .. A defendant is entitled to be safeguarded in every constitutional right, but should not be permitted to so juggle with such rights as to embarrass and delay the courts or to defeat the ends of justice."

Wagstaff, 772 P.2d at 990.

This case is similar to *Anderson*, *Meyers*, and *Wagstaff*. The defendant in this case knew his trial was coming up, because he was present when the bench trial for October was set. Docket Page 4. His attorney knew of the November bench trial date. R. 17. The

defendant failed to maintain contact with his attorney. R. 53[1]. The defendant also failed to appear at his scheduled bench trial on November 26, 2001. R. 53[1]. Therefore, following established precedent, once the defendant has notice, the permissible inference is that he was voluntarily absent, unless there is some showing by the defendant that his absence was in fact involuntary. In this case, no affidavits or evidence of any kind were offered by the defendant that he was incarcerated, comatose, or otherwise involuntarily absent. He now "cannot benefit by claiming that he was not voluntarily absent from court." *Wagstaff*, 772 P.2d at 990.

POINT II

ALTHOUGH THE DEFENDANT PROPERLY ASSERTED HIS STATUTORY RIGHT TO A TRIAL BY JURY, HE SUBSEQUENTLY WAIVED THIS RIGHT BY FAILURE TO MAINTAIN CONTACT WITH HIS ATTORNEY

Defendant claims that under the Utah Constitution he is guaranteed a jury trial for a Class B misdemeanor. *Br. Aplt.* at 17. He also argues under the alternative theory that he has a statutory right to a jury trial. *Br. Aplt.* at 19. In this case, the defendant failed to raise the state constitutional issue before the trial court; therefore, any argument under the Utah Constitution is waived. Furthermore, although the state acknowledges that the defendant asserted his statutory right to a jury trial, the defendant waived that right when he failed to contact his attorney for the three months between the setting of the trial date and the actual date of trial.

A. Because the Defendant Never Raised the State Constitutional Right to a Jury Trial in the Trial Court, This Court Should Only Examine the Federal Constitutional Right to a Jury Trial for Class B Misdemeanors.

The defendant concedes that under the sixth amendment to the federal constitution there is no right to a jury trial. *Br. Aplt.* at 16. However, the defendant seeks to argue that he has a constitutional right to a jury trial under the Utah Constitution. *Br. Aplt.* at 17. This Court holds that "the proper forum in which to commence thoughtful and probing analysis of state constitutional interpretation is before the trial court, not . . . for the first time on appeal." *State v. Dudley*, 847 P.2d 424, 426 (Utah Ct. App.1993)(*quoting State v. Bobo*, 803 P.2d 1268, 1273 (Utah Ct.App.1990)) Furthermore, this Court has held that "[w]hen an appellant does not brief a state constitutional argument below, this court will not address it, but rather will analyze the alleged violation under the federal constitution." *West Valley City v. McDonald*, 948 P.2d 371, 375-376 (Utah Ct. App.1997) Similar to this case, in the *McDonald* case, the defendant argued that the Utah Constitution provides for a jury trial in all proceedings, including an infraction. *Id.* at 374. This Court specifically noted that none of the defendant's motions or arguments before the trial court referred to the state constitutional issue, and therefore held under the federal constitution that the defendant did not have a constitutional right to a jury trial. *Id.* at 375.

Similarly, the defendant in this case did not raise the state constitutional issue before the trial court in either motions or proceedings for which there is a transcript. On November 6, 2001, the defendant filed a Motion to Strike Bench Trial and Demand for

Trial by Jury. R. 17. The defendant also filed a memorandum accompanying that motion. R. 18-20. Within that memorandum the defendant cites Rule 17(d) of the Utah Rules of Criminal Procedure to assert his statutory right to a jury trial. R. 18. The defendant also states that he "has a Constitutional right to a jury trial, as it has been held in Utah that DUI is one misdemeanor offense that is not a petty offense, but is considered to be a very serious offense." R. 19. The Utah constitution is not referenced, nor cited. Additionally, the use of the phrase "petty offense" is the exact language the courts have used to analyze the right to a jury trial under the federal constitution. *See Lewis v. United States*, 518 U.S. 322, 324, 116 S.Ct. 2163, 2166, 135 L.Ed.2d 590 (1996); *Blanton v. North Las Vegas*, 489 U.S. 538, 541, 109 S.Ct. 1289, 1292, 103 L.Ed.2d 550 (1989). At the trial on November 26, 2001, defense counsel did not make any motions or objections on the record, but merely stated to the court that he believed there to be case law holding once a jury trial was set and asked for there was a right to a jury trial. R. 53 [1] This language itself has no reference to state constitutional arguments.

The only time the defendant raised the state constitutional issue was in the untimely filed Motion to Set Aside Verdict and Grant New Trial. R. 24. Under Rule 24 of the Utah Rules of Criminal Procedure, "[a] motion for a new trial shall be made within 10 days after imposition of sentence, or within such further time as the court may fix during the ten-day period." Utah Rules of Criminal Procedure 24(c). This Court held that the language of this rule "requires that a motion for new trial be filed within ten days *after*

imposition of *sentence*." *State v. Vessey*, 957 P.2d 1239, 1240 (Utah Ct. App.1998)(per curiam). Therefore a motion for a new trial filed after conviction but before sentencing is untimely under Rule 24(c). *Id.* In this case, the defendant filed his Motion to Set aside Verdict and Grant New Trial on December 28, 2001. R. 24. However, the defendant was not sentenced until January 14, 2002. Therefore, the motion was untimely, and the record reflects the trial court never addressed the motion on the merits.

Because the defendant failed to properly raise the state constitutional issue at the trial level, in either motions or proceedings on the record, this Court should only analyze the right to a jury trial under the federal constitution. In this case, the defendant has conceded that he does not have a right to a jury trial under the federal constitution, therefore, only the defendant's statutory right to a jury trial should be addressed.

Even if this Court determines the defendant properly raised the state constitutional right to a jury trial, the proper analysis to determine the assertion of that right and the waiver thereof is found in Rule 17 of the Utah Rules of Criminal Procedure. Although no court has explicitly stated there is a constitutional right to a jury trial in misdemeanor cases under the Utah Constitution, the Utah courts have noted that there is a right under the Utah Constitution to be tried by a jury. *See State v. Moosman*, 794 P.2d 474, 476 (Utah 1990); *International Harvester Credit Corporation v. Pioneer Tractor and Implement, Inc.*, 626 P.2d 418, 419-20 (Utah 1981); *State v. Black*, 551 P.2d 518, 520 (Utah 1976). While acknowledging that right, the Utah courts analyze that right using Utah Code § 77-1-6 and

Rule 17 of the Utah Rules of Criminal Procedure. *See State v. Cook*, 714 P.2d 296 (Utah 1986)(per curiam)(where the court was "protect[ing] a valuable constitutional right" the court discussed and followed U.C.A., 1953, § 77-35-17(c), (d), as amended (1982 ed.)); *State v. Stevens*, 718 P.2d 398 (Utah 1986)(per curiam)(where defendant claimed he was denied a constitutional right to a jury trial, the court quoted U.C.A., 1953, § 77-35-17(c), (d), as amended (1982 ed.) and discussed the statutory right to a jury trial); *compare Salt Lake City v. Roseto*, 2002 UT App 66, ¶ 13, 44 P.3d 835 (noting that while both parties agreed there was no constitutional right to a jury trial for a Class C misdemeanor, the legislature is permitted to recognize that right by statute). Therefore, the constitutional analysis mirrors the statutory analysis. *See* discussion *infra* Part II.B.

B. The Defendant Properly Asserted His Statutory Right to a Jury Trial, But Waived that Right When He Failed to Keep in Contact With His Attorney for Three Months Prior to the Set Trial Date.

Utah Code § 77-1-6(2)(e) states that "[n]o person shall be convicted unless by verdict of a jury, or upon a plea of guilty or no contest, or upon a judgment of a court when trial by jury has been waived, or in case of an infraction, upon a judgment by a magistrate." Utah Code Ann. § 77-1-6(2)(e)(1999). Therefore, Utah law provides criminal defendants with a statutory right to a jury trial. The legislature has specified how that right is to be asserted and the steps necessary to waive that right in Rule 17 of the Utah Rules of Criminal Procedure. Under this statutory scheme, the defendant asserted the

right to a jury trial, but his failure to comply with his known duty to maintain contact with his attorney effectively waived that statutory right.

1. The Defendant Obtained a Statutory Right to a Jury Trial When the Trial Court Set a Date for a Jury Trial.

Rule 17 of the Utah Rules of Criminal Procedure details the manner in which the jury right is asserted. The legislature treats felonies different than misdemeanors and infractions. In all felony cases, the presumption is that the defendant "shall be tried by jury." Utah Rules of Criminal Procedure Rule 17(c). For misdemeanor cases, the presumption is against jury trials. Specifically, "[a]ll other cases shall be tried without a jury." Utah Rules of Criminal Procedure Rule 17(d). For a defendant to assert his right to a jury trial he must either make a written demand or the court must order a jury trial. *Id.* For infractions, no jury trial is allowed. *Id.*

The State acknowledges that in this case the defendant complied with the requirements to assert his right to a jury trial. In this case, both sides agree that no written demand for a jury trial was made prior to the September 12, 2001 trial date. *Br. Aplt.* at 20. However, a defendant can still obtain a jury trial if "the court orders otherwise." Utah Rules of Criminal Procedure Rule 17(d). In this case, the court setting the matter for a jury trial complied with this provision. R. 13. *see Salt Lake City v. DeYoung*, 2001 UT App 310 (memorandum decision)(attached as Addendum B)(noting trial judge's oral order setting the matter for jury trial was sufficient to require a jury trial under Rule 17(d)).

2. The Defendant Waived That Right When He Failed in his Duty to Maintain Contact With His Attorney During the Three Months Prior to Trial.

Under the Utah Rules of Criminal Procedure, the waiver of the right to a jury trial is also treated different depending upon whether the charges are felony or misdemeanor charges. Under Rule 17(c), in all felony cases, any waiver by the defendant of his right to a jury trial must be in open court, must have the approval of the court, and the prosecuting attorney must consent to the waiver. Utah Rules of Criminal Procedure Rule 17(c). For misdemeanor cases, the legislature did not specify how a defendant could waive the jury trial. This difference suggests that the legislature did not intend as strict a requirement for waiver in misdemeanor cases as is found in felony cases.

ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED

Oral argument would not significantly aid the Court in deciding this case. Because this case raises no novel question of law, a published opinion would make no useful addition to the body of Utah law.

CONCLUSION

Based on the foregoing, defendant's convictions should be affirmed.

RESPECTFULLY submitted on 19 August 2002.

DAVID YOCOM
Salt Lake County District Attorney

Cara Tangaro

CARA TANGARO
Deputy District Attorney
Attorney for Plaintiff/Appellee

CERTIFICATE OF DELIVERY

I, Cara Tangaro, hereby certify that I have caused to be delivered eight copies of the foregoing brief to the Utah Court of Appeals, 450 South State Street, 5th Floor, P.O. Box 140320, Salt Lake City, Utah 84114-0230, and two copies to Michael Misner, Attorney for the Appellant, 424 East 500 South, Suite 300, Salt Lake City, Utah, 84111, this 19 day of August, 2002.

Cara Tangaro

CARA TANGARO
Deputy District Attorney
Attorney for Plaintiff/Appellee

DELIVERED to the Utah Court of Appeals and the *Appellant* as indicated above this 19 day of August, 2002.

Cara Tangaro

ADDENDUM A

occasions over an extended period of time and while in a position of trust toward the victim. State v. Copeland, 765 P.2d 1266 (Utah 1988).

The fact that defendant, who was convicted of sodomy on a child, was a victim of sexual abuse as a child did not make the imposition of a ten-year minimum mandatory sentence cruel punishment as applied to him in contrast to other offenders. State v. Bastian, 765 P.2d 902 (Utah 1988).

Excessive fines.

When a nonprofit corporate club violated the former Liquor Control Act several times by selling intoxicating drinks to a police officer and his wife over a three-week period, and the club was convicted of three separate violations, the imposition of three maximum $2,500 fines (making the total fine $7,500) was excessive since the officer and his wife were engaged in a single mission over the three-week period, and the drinks served them during that period constituted a single continuing violation. State v. Starlight Club, 17 Utah 2d 174, 406 P.2d 912 (1965).

Juvenile proceedings.

This section has application to criminal cases where a presumption of innocence prevails and does not apply to the proceedings in juvenile courts where incorrigible or delinquent children are being trained and their habits corrected since juvenile court proceedings are civil and not criminal. Donald R. v. Whitmer ex rel. Salt Lake County, 30 Utah 2d 206, 515 P.2d 617 (1973).

Voir dire examination.

Individual, sequestered death-qualification voir dire of prospective jurors in a capital homicide case does not, in and of itself, violate the defendant's rights to a fair and impartial jury. State v. Shaffer, 725 P.2d 1301 (Utah 1986).

COLLATERAL REFERENCES

Utah Law Review. — The Courts, the Constitution, and Capital Punishment, 1968 Utah L. Rev. 201.

Am. Jur. 2d. — 8 Am. Jur. 2d Bail and Recognizance § 74.

C.J.S. — 8 C.J.S. Bail § 69; 22 C.J.S. Criminal Law § 24 et seq.

A.L.R. — Automobiles: validity and construction of legislation authorizing revocation or suspension of operator's license for "habitual," "persistent," or "frequent" violations of traffic regulations, 48 A.L.R.4th 367.

Key Numbers. — Bail ⇐ 7.

Sec. 10. [Trial by jury.]

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

History: Const. 1896.

Cross-References. — Civil actions, right to jury trial in, U.R.C.P., Rules 38, 39.

NOTES TO DECISIONS

ANALYSIS

Abatement of nuisance.

Former section regarding abatement of brothel as nuisance, insofar as it provided for imprisonment and authorized court in equity proceedings to impose jail sentence, held unconstitutional as violating this section. State

Workmen's Compensation Act is not invalid because it delegates to industrial commission the power to hear, consider and determine controversies between litigants as to ultimate liability, or their property rights. Utah Fuel Co. v. Industrial Comm'n, 57 Utah 246, 194 P. 122 (1920).

Dependents of employee killed by acts of third party, a stranger to employment, are not limited to recovery under Workmen's Compensation Act exclusively, unless they have assigned their rights to insurance carrier. Robinson v. Union Pac. R.R., 70 Utah 441, 261 P. 9 (1927).

Cited in Wrolstad v. Industrial Comm'n, 786 P.2d 243 (Utah Ct. App. 1990).

COLLATERAL REFERENCES

Utah Law Review. — No-Fault Automobile Insurance in Utah — State Constitutional Issues, 1970 Utah L. Rev. 248.

Comment, The Defense of Entrapment: Next Move — Due Process? 1971 Utah L. Rev. 266.

Comment, The Scope of Fourteenth Amendment Due Process: Counsel in Prison Disciplinary Proceedings, 1971 Utah L. Rev. 275.

Comment, The Utah Supreme Court and the Utah State Constitution, 1986 Utah L. Rev. 319.

Outdoor Sports and Torts: An Analysis of Utah's Recreational Use Act, 1988 Utah L. Rev. 47.

Recent Developments in Utah Law — Judicial Decisions — Constitutional Law, 1990 Utah L. Rev. 129.

Am. Jur. 2d. — 16A Am. Jur. 2d Constitutional Law §§ 613 to 617.

C.J.S. — 16D C.J.S. Constitutional Law §§ 1428 to 1437.

A.L.R. — Exclusion of public from state criminal trial in order to preserve confidentiality of undercover witness, 54 A.L.R.4th 1156.

Exclusion of public from state criminal trial in order to prevent disturbance by spectators or defendant, 55 A.L.R.4th 1170.

Exclusion of public from state criminal trial in order to avoid intimidation of witness, 55 A.L.R.4th 1196.

False light invasion of privacy—defenses and remedies, 57 A.L.R.4th 244.

Imputation of criminal, abnormal, or otherwise offensive sexual attitude or behavior as defamation—post-New York Times cases, 57 A.L.R.4th 404.

Libel or slander: defamation by statement made in jest, 57 A.L.R.4th 520.

Defamation: designation as scab, 65 A.L.R.4th 1000.

Intentional spoliation of evidence, interfering with prospective civil action, as actionable, 70 A.L.R.4th 984.

Key Numbers. — Constitutional Law ⇐ 322, 324, 327, 328.

Sec. 12. [Rights of accused persons.]

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

History: Const. 1896.

Cross-References. — Rights of defendants, statutory provisions, § 77-1-6.

NOTES TO DECISIONS

Cited in State v. Gardner, 2001 UT 41, 23 P.3d 1043.

Rule 2. Time.

(a) In computing any period of time, the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday. When a period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall not be included in the computation.

(b) When an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion:

(1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order; or

(2) upon motion made after the expiration of the specified period, permit the act to be done if there was a reasonable excuse for the failure to act; but the court may not extend the time for taking any action under the rules applying to a judgment of acquittal, new trial, arrest of judgment and appeal, unless otherwise provided in these rules.

(c) A written motion other than one that may be heard ex parte and notice of the hearing thereof shall be served not later than five days before the time specified for the hearing, unless a different period is fixed by rule or order of the court. When a motion is supported by affidavit, the affidavit shall be served with the motion and opposing affidavits may be served not less than one day before the hearing unless the court permits them to be served at a later time. (Amended effective April 1, 1999.)

Amendment Notes. — The 1999 amendment substituted "11 days" for "seven days" in the last sentence in Subdivision (a).

Rule 3. Service and filing of papers.

(a) All written motions, notices and pleadings shall be filed with the court and served on all other parties.

(b) Whenever service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney, unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made in the manner provided in civil actions.

(c) The party preparing an order shall, upon execution by the court, mail to each party a copy thereof and certify to the court such mailing.

NOTES TO DECISIONS

Service on attorney.

Notice served upon a party's attorney of record is sufficient. State v. Wagstaff, 772 P.2d 987 (Utah Ct. App. 1989).

Rule 4. Prosecution of public offenses.

(a) Unless otherwise provided, all offenses shall be prosecuted by indictment or information sworn to by a person having reason to believe the offense has been committed.

(b) An indictment or information shall charge the offense for which the defendant is being prosecuted by using the name given to the offense by common law or by statute or by stating in concise terms the definition of the offense sufficient to give the defendant notice of the charge. An information

the defendant guilty as charged State v Gentry 747 P2d 1032 (Utah 1987)

Cited in State v Eldredge 773 P2d 29 (Utah 1989) State v Belgard 830 P2d 264 (Utah 1992) State v Beason 2000 UT App 109 2 P3d 459 State v Rudolph 2000 UT App 155 3 P3d 192

COLLATERAL REFERENCES

Am Jur 2d — 21 Am Jur 2d Criminal Law § 785 et seq

C J S — 23A C J S Criminal Law § 1453 et seq

A L R — Coram nobis on ground of other's confession to crime 46 A L R 4th 468

Rule 24. Motion for new trial.

(a) The court may, upon motion of a party or upon its own initiative, grant a new trial in the interest of justice if there is any error or impropriety which had a substantial adverse effect upon the rights of a party

(b) A motion for a new trial shall be made in writing and upon notice The motion shall be accompanied by affidavits or evidence of the essential facts in support of the motion If additional time is required to procure affidavits or evidence the court may postpone the hearing on the motion for such time as it deems reasonable

(c) A motion for a new trial shall be made within 10 days after imposition of sentence, or within such further time as the court may fix during the ten-day period

(d) If a new trial is granted, the party shall be in the same position as if no trial had been held and the former verdict shall not be used or mentioned either in evidence or in argument

NOTES TO DECISIONS

Absence of witness
Affidavits of jurors
Bias or prejudice of jurors
Discretion of court
Effect on notice of appeal
Evidence in support of motion
Misconduct of jury
Motion to reopen preliminary rehearing — Dismissal of charges
Newly discovered evidence
Prosecutorial misconduct
Verdict supported by evidence
Cited

Absence of witness.

Where the evidence was discovered before trial but the witness was absent, not only must diligence have been shown in attempting to obtain the testimony of such witness, but an application must have been made to obtain a postponement of the trial so as to give opportunity to obtain such witness or evidence before defendant might avail himself of a motion for a new trial on the ground of newly discovered evidence State v Weaver, 78 Utah 555, 6 P2d 167 (1931)

Defendant was not entitled to a new trial to produce a witness who was unavailable at trial where witness' absence was not due to any error or impropriety at trial, but was due to attendance at an out-of-town convention, and defendant did not ask for a new trial date or a continuance to accommodate the witness' calendar State v Gehring, 694 P2d 599 (Utah 1984)

Affidavits of jurors

Verdict of guilty of larceny of sheep which recommended leniency was not a chance verdict and could not be impeached by affidavits of eight jurors that they would not have voted defendant guilty if they thought he would thereby receive a jail sentence State v Priestley 97 Utah 158 91 P2d 447 (1939)

Motion for new trial following rape conviction on ground of misconduct of jury was properly denied notwithstanding affidavits of four jurors filed in support of motion reciting that they were in favor of acquittal on first ballot but that as one of jurors stated that if they found defendant guilty with recommendation of leniency he would have to serve only a few months in jail, they thereupon were persuaded to vote for conviction where affidavits showed no coercion or tactics which might have stripped any juror of his ability to act in accordance with his honest convictions State v Moore, 111 Utah 458, 183 P2d 973 (1947)

Jurors could not impeach their verdicts except in instances expressly made exceptions by legislative enactments and, where a defendant submitted affidavits of two jurors to the effect that, if the record did not support the conclusion of the state's expert witness then these two jurors would not have voted for the verdict, such affidavits were conditional and would be of no avail to the defendant where the verdict was justified by the record State v Rivenburgh, 11 Utah 2d 95, 355 P2d 689 (1960), appeal dismissed, 368 U S 144, 82 S. Ct 247, 7 L Ed 2d 188, cert denied, 368 U S 922, 82 S Ct 246, 7 L Ed 2d 137 (1961)

ADDENDUM B

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Utah.

SALT LAKE CITY, Plaintiff and Appellee,
v.
Rulon F. DeYOUNG, Defendant and Appellant.

No. 20000522-CA.

Oct. 18, 2001.

Clayton A. Simms, Salt Lake City, for appellant.

Padma Veeru-Collings, Salt Lake City, for appellee.

Before GREENWOOD, JACKSON, and DAVIS, JJ.

MEMORANDUM DECISION (Not For Official Publication)

GREENWOOD, Presiding Judge.

***1** Defendant appeals his conviction for Interfering with Officer in Discharge of Duty, in violation of Salt Lake City Code § 11.04.030(B), a Class B Misdemeanor. While defendant raises three arguments on appeal, only one requires discussion. [FN1] The trial court committed reversible error by denying defendant a jury trial despite previous court orders stating a jury trial would be held. Accordingly, we reverse.

FN1. Besides the violation of defendant's statutory right to a jury trial, defendant also claims that the trial court erred in not deciding whether defendant would proceed pro se and in allowing Salt Lake City Prosecutors to withhold evidence that defendant was entitled to receive before trial. Because we reverse on defendant's statutory right to a jury trial, we do not address these issues.

Because defendant was charged with a Class B Misdemeanor, [FN2] he does not have the right to a jury under the United States Constitution. *See West Valley City v. McDonald,* 948 P.2d 371, 374 (Utah Ct.App.1997) (adopting *Lewis v. United States,* 518 U.S. 322, 116 S.Ct. 2163 (1996), holding, Constitution does not guarantee a right to jury trial to defendant charged with petty crime). However, under Rule 17(d) of the Utah Rules of Criminal Procedure, a defendant charged with a misdemeanor can still obtain a jury trial if "the defendant makes written demand at least ten days prior to trial, *or the court orders otherwise.*" Utah R.Crim. P. 17(d) (emphasis added). Defendant concedes he never made a written demand for a jury trial, but argues he was entitled to jury trial because the court "order[ed] otherwise." We agree.

FN2. *See* Utah Code Ann. § 76-3-204(2) (1999) (stating a Class B Misdemeanor carries a maximum penalty of six months in jail).

On January 26, 2000, a pretrial conference took place before Judge Pat Brian. After counsel entered an appearance for the record, Judge Brian asked what the parties wanted. Defendant's counsel responded, "Your Honor, we would ask for a jury trial date." Judge Brian replied, "The matter is set for jury trial." A minute entry scheduling a jury trial for defendant was signed by Judge Brian. [FN3] In addition, Judge Ann Boyden signed an Order to Continue Jury Trial, and Salt Lake City filed both a "Motion to Continue Jury Trial," and "Plaintiff's Proposed Instruction to the Jury."

FN3. Judge Brian's oral order is sufficient to require a jury trial as oral orders are enforceable under Utah law. *Cf.Envirotech Corp. v. Callahan,* 872 P.2d 487, 498 (Utah Ct.App.1994) (affirming a contempt of court ruling for defendant's violation of an oral order of the trial court).

"When the language of a rule or statute is unambiguous, Utah courts have consistently held the rule's plain language must be followed." [FN4] *State v. Vessey,* 957 P.2d 1239, 1240 (Utah Ct

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.App.1998). Accordingly, defendant was entitled to a jury trial either by submitting a written request or when the trial court ordered that a jury trial take place. The statutory language "or the court orders otherwise" allows a defendant a jury trial even if not requested in writing, if the trial court so orders. Otherwise, the quoted language would be superfluous. *See State v. Morrison,* 2001 UT 73, & para;11, 428 Utah Adv. Rep. 28 (stating that under rules of statutory construction, this court has a "fundamental duty to give effect ... to every word in a statute[,]" and to avoid interpretations that render "parts or words in a statute inoperative or superfluous" (internal quotations and citations omitted)).

> FN4. Each party concedes that the language of Rule 17(d) is clear and unambiguous.

Defendant obtained an order from the trial court and therefore had a right to a jury trial. Because the trial court refused to grant defendant a jury trial pursuant to Rule 17(d), we reverse and remand for a new trial consistent with this decision.

NORMAN H. JACKSON, Associate Presiding J., and JAMES Z. DAVIS, J., concur.

2001 WL 1243267 (Utah App.), 2001 UT App 310

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