COURT OF APPEALS, DIVISION ONE

BRIEFS

SECTION 2

1 CA-CR 7125

STATE OF ARIZONA

Appellee,

v.

RAYMOND STEWART BOURBEAU,

Appellant.

MOHAVE COUNTY
SUPERIOR COURT
NO. CR 5878

TRANSMITTAL DATE

00095

ORIGINAL

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

STATE OF ARIZONA, Appellee, -vs- RAYMOND STEWART BOURBEAU, Appellant.	)	1 CA-CR 7125 MOHAVE COUNTY SUPERIOR COURT No. CR-5878

APPELLANT'S OPENING BRIEF

DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA
FILED AUG 1 1983
GLEN D. CLARK, CLERK
By

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8-22-83

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STATEMENT OF THE CASE

On December 15, 1982, a criminal complaint was filed in the Bullhead City Justice Court charging the appellant with theft, a Class 3 Felony, in that he knowingly controlled property of the United States Government, to wit: postage stamps and currency valued at more than $1,000; with burglary in the third degree, a Class 5 Felony, of a non-residential structure, to wit: the Bullhead City, Arizona Post Office; and with burglary in the third degree, a Class 5 Felony, of a non-residential structure, to wit: the Riviera, Arizona Post Office. The offenses were alleged to have occurred on or about November 8, 1982.

It should be noted that following these charges, the appellant was subsequently indicted by the Mohave County Grand Jury for the above set forth alleged offenses.

On January 4, 1983, a Motion to Add Allegation of Prior Conviction as an Addendum to the Indictment was filed by the State alleging that on March 7, 1979, the appellant was found guilty of attempted theft in the Superior Court of the State of Arizona. On January 28, 1983, a hearing was held on this motion and defense counsel requested a one-week continuance which was granted by the Court.

The appellant entered into a plea agreement with the State wherein the appellant agreed to plead guilty to theft, Class 3 Felony. On February 15, 1983, at a

change of plea hearing in Superior Court, before the hearing was started the appellant escaped by running out of the courtroom and was subsequently recaptured. Since both defense and State were unprepared for trial on February 23, 1983, the State asked for a continuance of the trial. This motion for a continuance was granted and trial was reset for March 30, 1983.

On March 11, 1983, the State filed a Motion to Add Allegation of Commission of Offense While Released From Confinement as an Addendum to the Indictment, alleging that each offense charged in this matter was committed while the appellant was on parole. This Motion was set for hearing on March 30, 1983.

On March 25, 1983, the State filed a Motion to Add Allegation of Prior Conviction as an Addendum to the Indictment alleging that the appellant committed escape in the second degree, a Class 5 Felony, which charge is still pending in Mohave County Superior Court Cause No. 6001.

On March 29, 1983, the State filed another Motion to Add Allegation of Prior Conviction as an Addendum to the Indictment alleging that appellant was convicted of unlawful sexual intercourse, a felony, in the Los Angeles County Superior Court of the State of California on September 24, 1981.

On March 29, 1983, counsel for the appellant filed a Motion to Suppress the confession given to Sheriff's

Detective Robin Holmes on December 14, 1982. On March 29, 1983, a hearing was held on the Motion to Suppress and the Court continued this matter to March 30, 1983.

Before the hearing was complete on March 30, 1983, and before the judge ruled on the motion, the appellant elected to plead guilty to all the charges and to one prior conviction. All other charges were dismissed. The Court found that the appellant knowingly, intelligently and voluntarily pled guilty to the charge of theft and two counts of burglary in the third degree as contained in Counts I, II and III of the indictment and there was factual basis for his pleas. Further, the Court found that the appellant knowingly, intelligently and voluntarily admitted having a prior felony conviction for attempted theft, the Court found a factual basis for that admission and it was accepted and entered of record.

It was ordered scheduling the matter for judgment and sentence on April 22, 1983.

On April 25, 1983, the judgment and sentence hearing was held since the matter had been continued from a previously scheduled time because the Court had been given a message that the defendant tried to commit suicide. The Court was further advised, the morning of April 25, that the appellant tried to commit suicide again. The Court questioned counsel as to whether or not appellant wanted this matter continued and was advised by defense counsel that the appellant wished to proceed with

sentencing at that time. It was the judgment of the Court that the appellant was guilty of the crime of Theft, a Class 3 Felony, committed on or about the 8th day of November, 1982, as contained in Count I of the indictment; the crime of Burglary in the Third Degree, a Class 5 Felony, committed on or about the 8th day of November, 1982 as contained in Count II of the indictment; and the crime of Burglary in the Third Degree, a Class 5 Felony, committed on or about the 8th day of November, 1982, as contained in Count III of the indictment. It was also the judgment of the Court that the appellant had previously been convicted of the offense of Attempted Theft, a felony, in Mohave County Superior Court, Cause Number 4057. The Court found aggravating and mitigating circumstances and sentenced the appellant as a non-dangerous offender with one prior felony conviction. As to Count I, Theft, a Class 3 Felony, with one prior felony conviction, the Court imposed the presumptive sentence of seven and one-half years, said sentence commencing as of December 14, 1982. As to Count II, Burglary in the Third Degree, a Class 5 Felony, with one prior felony conviction, the Court imposed the presumptive sentence of three years, said sentence commencing December 14, 1982. As to Count III, Burglary in the Third Degree, a Class 5 Felony, with one prior felony conviction, the Court imposed the presumptive sentence of three years, said sentence

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to commence at the conclusion of the sentences imposed in Counts I and II. The appellant was also ordered to pay a fine to the Clerk of Superior Court of Mohave County of $8,000 plus statutory surcharges for a total of $10,960 as to Count I and that fine would be a fine of restitution and the Clerk will pay the fine to the United States Post Office or whoever the Court deems appropriate and disperse the surcharges in accordance with the law.

On May 3, 1983, a Notice of Appeal from Superior Court appealing the judgment and sentence imposed was filed in Superior Court.

COMPLIANCE WITH ANDERS V. CALIFORNIA

Counsel for appellant has searched the record on appeal pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). No arguable question of law has been found. It is respectfully requested that this Court search the record for fundamental error pursuant to A.R.S. § 13-4035. State v. Powell, 5 Ariz. App.51, 423 P.2d 127 (1967).

Respectfully submitted this 28th day of July, 1983.

Claude D. Keller
Attorney for Appellant

CERTIFICATE OF SERVICE

STATE OF ARIZONA)
) ss.
County of Mohave)

The undersigned, a Notary Public in and for the County of Mohave, State of Arizona, hereby states that she personally mailed three (3) copies of the foregoing Appellant's Opening Brief to the following individuals:

Mr. William J. Schafer, III
Assistant Attorney General
Chief Counsel, Criminal Division
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Phoenix, Arizona 85007
Attorney for APPELLEE
Two (2) copies

Raymond Stewart Bourbeau
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Said service being accomplished on the 28th day of July, 1983.

Ruth Mougeot
Notary Public

My Commission Expires:

November 8, 1986

ORIGINAL

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

STATE OF ARIZONA, Appellee, vs. RAYMOND S. BOURBEAU, Appellant,	)	1 CA-CR 7125

APPELLANT'S SUPPLEMENTAL BREIF

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DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA

FILED DEC 5 1983

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5.	TRANSCRIPT	

(a) refers to: Kraepelin, E., Psychiatry, 8th edn., Leipzig 1913.

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ISSUES FOR REVIEW

A. WAS APELLANT MOVED INTO STATEMENT UNDER SEPTICEMIA CONDITIONS AND MADE APPELLANT'S MENTAL STATE MORE SUSCEPTIBLE TO BEING INFLUENCED OR SWAYED INTO SAYING SOMETHING THAT WAS NOT TRUE.

B. IF THE MENTAL CAPACITY OF THE APPELLANT WAS STABLE AT ANY TIME DURING THE COURT PROCEEDING OR DURING THE PLEA OF GUILTY INTERED INTO TRANSCRIPTS.

C. IF THERE WAS A ERROR IN PROSECUTING APPELLANT PRIOR TO APPELLANT BEING EXAMINED BY A PSYCHIATRIST AND ALLOWING APPELLANT TO RECEIVE MEDICATION INORDER TO STABILIZE APPELLANT'S MENTAL DISORDER.

D. IF JUDGE ERRED IN ALLOWING PRIOR CONVICTIONS TO BE INTRODUCED ON THE EVE OF TRIAL.

E. IF JUDGE ERRED IN ALLOWING APPELLANT TO BE SENTENCED UNDER TWO STATUTES ARISING FROM THE SAME CRIME.

F. IF THE JUDGE ERRED IN ALLOWING PROCEEDINGS TO CONTINUE ONCE IT WAS RECOGNIZED BY THE COURT THAT ATTORNEY FOR APPELLANT WAS INCOPETANT TO GIVE ADEQUATE DEFENSE OR HANDLE THE CASE WITH COPETENCE.

ARGUEMENT

(A)

At the time of arrest appellant was experiancing mental problems which effected appellant's state of mind (see Arguement C for further detail on mental state of mind).

On December 14, 1982, appellant was arrested at 966 Church Street, Holiday Shores, Arizona. The afore mentioned residence is a friend of appellants' trailor. Appellant was at this residence inorder to see if the friend would like to go fishing on Lake Mohave, so that appellant might find the time to relax for awhile.

Appellant had been driving back and forth between Riviera, Arizona and San Diego, California for a period of four or five days without sleep. Reason appellant was driving between the two states was to see a girlfriend in Arizona and to bail out a friend in San Diego County Jail.

Appellant was trying to get a relationship reestablished with girlfriend in Riviera, Arizona, inorder that appellant might settle down and get married. Appellant has known girlfriend since 1977, and was engaged this same year. Through the series of talks between girlfriend and appellant it was decided, by appellant's girlfriend, that if appellant were to clear himself of all legal actions they would get married. Appellant agreed with her on those terms.

So appellant went back out to San Diego, California inorder to clear up some personal matters pertaining to friend in San Diego County Jail; from there appellant was going to turn himself into the California Authorities.Prior to doing this appellant wanted to see girlfriend once more and to make sure of everything that was

said in regards to appellant clearing himself with authorities.

Upon appellant returning to Riviera, Arizona, on December 14, 1982, appellant found girlfriend was not at home. So appellant went over to friends' house in Holiday Shores, at previous mentioned address, inorder to try and relax prior to seeing girlfriend later.

Bullhead City Sheriff Officers arrested appellant at afore mentioned address later that same afore mentioned day. They arrested appellant on a Fugitive Warrent from California, issued by appellant's Parole Officer.

Upon being taken to bullhead City Sub Station, 108 Main St., Bullhead City, Arizona, appellant was subjected to questioning pertaining to Post Office burglaries. Appellant denied having knowledge of any such crimes in this state. After an hour or two, Bullhead City Sheriff Officers arrested Steve Squillante, appellant's friend at 966 Church Street, Holiday Shores, Arizona, son.

Detectives had informed appellant that they have one of the guys, reffering to S. Squillante, who burglarized the Post Offices. When appellant asked how they knew S. Squillante committed these crimes, Detective informed appellant that S. Squillante looks like the guy and they have positive fingerprint match-up.

Appellant knew S. Squillante had not committed these crimes for two reasons. One being S. Squillante is not a theif, is very strong mindedin doing the right things inorder to please his father, appellants' friend. The other reason is from being around a few people in Holiday Shores area who had mentioned the crime to

appellant in as much to afford appellant with information of how the crime was committed and possibly the persons who had done it themselfs.

They put Steve Squillante next to my holding cell. Appellant tried to calm S. Squillante down and comfort him, because Steve Squillante was upset pretty bad that this whole thing was happening to him.

About a half an hour later, another Detective walked in and started asking appellant more questions as to the Post Office crimes. Appellant asked how come they were trying to frame S. Squillante. Detective replied that the evidence was sufficient to warrent his arrest. Detective further replied on how appellant knew S. Squillante was innocent of these crimes. Appellant reffered to gossip he had heard while being in town. Detective further stated that if appellanthad anything to do with the crime, appellant could admitt to it now and do his time in the state of Arizona, close to girlfriend and not be exradited to California, and probally not receive more than five years imprisoment do to the fact Detective knew prosecuting attorney.

Appellant asked to use the phone inorder to call girlfriend, to decide if he would talk to Detective. Upon completion of the phone call, appellant was further deleted in his stabilization of moods due to conversation with girlfriend; which consisted mainly of her changing her mind about getting back together.

Appellant was in a mild manic-stage after the phone conversation with girlfriend. Appellant also figured he was going to do

time in California so he might as well admitt to these crimes so as not to let them frame S. Squillante with the charges of Post Office burglary. Appellant was in a state of mind as not to care how long he would be locked up due to mild manic-stage of appellant's mind.

Appellant informed detective that S. Squillante had nothing to do with the crime because appellant had done it himself. Detective took appellant into detective's oofice and appellant made a statement consisting of saying appellant committed the Post Office burglaries.

They released Steve Squillante after this admission and appellant got transfered to Main County Jail in Kingman, Arizona.

Do to the susceptibility of appellant's mental state of mind, appellant feels he was influenced or swayed into giving statement to Detective.

ARGUEMENT

(B)

Upon entrance of the Mohave County Jail, Kingman, Arizona, appellant had not received any type of medication for his mental disorder, (see Arguement C for further detail on mental disorder).

Attorney was made aware of psychological problem with appellant, through observation and a brief medical report that was introduced as exhibit A on April 25, 1983, of the minutes taken in Court. Mr. Claude Keller, attorney for appellant, had knowledge of the type of illness the appellant had and the symptoms in which he has. Appellant's attorney failed to allow the appellant the opportunity to have a psychiatrist to evaluate appellant mental condition at that time. Though appellant feels that the emotional level he showed through all Court procedings should of been sufficient evidence that appellant was in need of some type of mental help. As such to allow appellant the medication needed to allow appellant the opportunity to defend himself in a rightful state of mind, other than what appellant was experiencing during all Court procedings.

From day one of the Preliminary Hearings through the completion of being sentenced in Superior Court, appellant was experiencing unstable-lization of mood swings. Appellant never felt the need to fight or defend himself in the Court for crimes charged. Appellant only felt need for punishment for guilt feelings arising from personal matters. While experiencing this mild state of 'suicide', need for punishment, appellant had no objections as to what they done. From lack of medication appellant further deteriated into a manic-stage of depression inwhich appellant tried to committ suicide on two separate occasions, almost in unison with each other. Appellant was out of the hospital for overdose

of drugs and was readmitted the same night for severing the antecubital vein on my left arm. Appellant would of done so again except Officers running jail had appellant 'hog tied', feet and arms shackled, and put in the Office Room, inorder to keep a minute by minute watch, and in-order to prevent appellant from trying to committ suicide again. The Officers of the jail requested Alhambra Reception and Treatment Center to pick as soon as possible inorder for appellant to get proper attention for appellant's mental condition, as to prevent appellant from trying to committ suicide again.

Appellant has had medical history of depression and manic-depressive states' of mind starting at a early age. It has ranged from minor depressed states, consisting of just being in a 'blue-mood', to manic-depression consisting of suicidal attempts. It has been pointed out (diagnoised) recently that appellant was a manic-depressive type person. Which is in need of medication to stabilize appellants' mood swings so that he might have a normal thought or behavioral pattern.

ARGUEMENT

(C)

Appellant's attorney had mentioned the possibility of appellants' apparent mood disorder. The Judge did ask if attorney was seeking a psychological evaluation prior to sentencing. Attorney replied no in response, as indicated on page 6, line 23, of the transcripts dated April 25, 1983.

Appellant has little arguement on the specific issue above, even though attorney failed to discuss psycriatric evaluation with appellant prior to telling Judge no. Appellant wishes to argue the fact of being unstabilized prior to arrest and up to and through Sentencing procedure.

I beleive the Court was aware of appellant mental condition, as indicated on page 8, line 6, of the transcripts dated April 25, 1983.

The following is refrences from books on the disorder appellant is thought to have or that is being treated for at this present time. appellant wishes to know if proper defense on behalf of appellant could of been obtained while experiencing this mental disorder, and if the possibility exist of giving statement under this disorder was permissable as evidence, or maybe can be reconsidered as to allow it as evidence.

[1]Depressive illness refers to a pathological reaction to a loss. Concieved as a disease entity, depressive illness is arbitrarily defined in terms of such observable symptoms as gross appearance of sadness, retardation in motitity and thought process, and tendencies toward self-castigation, and self-destructiveness.

[2]Manic-depressive reactions may vary in duration from a few hours to many years. The shorter the attack, the greater is the likelihood that the patient will be free of marked personality disorganization. Untreated depression last an average of one and a half years as compared with four to six months for untreated manic attacks. Although many

patients show spontaneous recovery from manic and depressive episodes, there is a high rate of readmission to mental hospitals. Age is an important variable: Older patients show a tendency toward longer attacks, briefer periods of remission, and increasing personality deterioration, paticularly manic patients.

[3]It is in the manic-depressive forms of psychoses where the struggle between the life and death instincts are most prominently displayed. Every depression represents either a tempory or permanent victory of the destructive over the erotic impulses. The self-torture of melancholiacs undoubtedly conceals something of the erotic and in this respect resembles the phenomena of compulsion neurosis, but in most cases of melancholia the death instinct colors the whole picture. Moreover, the gratification in both melancholia and compulsion neurosis is based on sadistic tendencies which belong to an outside object which have been turned on one's own person, and in both maladies the patients often succeed in taking revenge on the original object by the indirect path of self-punishment.

[4]The Affective Psychoses-Affective Reaction Type-Manic-Depressive Psychosis-These names are given to a group of mental disorders in which the basic upset is one of the emotions (effect). Individuals experiencing this type of illness vary in their mood from one time to another. For a period they are in a state of extreme elation; at another time they are profoundly depressed. This variation from cheerfulness to sadness is out of all proportion to any obvious variance in the patient's life-situation. Indeed, it may seem at odds with their opportunities. All their other symptoms seem secondary to exaggerated elation (or mania) or profound sadness. For this reason Kraepelin called the condition manic-

depressive insanity.[a]

Three main characteristics of this psychosis are that the basic disturbance is of the feelings, that this disturbance is periodic and that recovery from an attack leaves a personality entirely unimpaired. The last point is particularly important to remember when we come to consider the social effects of psychoses.

Manic-depressive psychosis usually appears first between the ages of twenty (20) and twenty-five (25), and it is commoner among women than men.

It must be understood that psychotic feelings of depression have the quality of the most extreme despair: The despair that can lead to suicide.

However, the majority of depressions can now be very effectively treated. The peculiar problem of this condition stems from of its symptoms: The patient himself has, as part of his illness, no insight into his illness. he does not see himself as ill, and he also has an overwhelming sense of quilt. In other words, he may well view his condition as moral rather than medical. He will not seek treatment for his symptoms, because he thinks of himself bad rather than mad. He feels that he is 'only getting what he deserves'. His guilt thus bars him from seeking help. For this reason it is important that people in the community should learn to recognize abnormal depressive reactions for what they are.

Depressions are sometimes classified as endogenous or erogenous ('neurotic' or 'reactive'). They are called endogenous when environmental factors are thought to be insufficient to account for the severity of

the disease. Thsi constrasts with the exogenous, or reactive depressions, where the reasons for the individual to be depressed are more obvious, such as bereavement or sudden poverty. Many psychiatrists think that no real distinction can be made between endogenous and exogenous depressions, and that 'reactive' factors are always present, that is to say, understandible features in the patient's enviroment that contribute to his illness. It is my own view that depressive illnesses arise out of a complexity of interpersonal relationships and needs; I also believe that depressions develop in people who are already vulnerable, and not completely 'out of the blue'. The trigger itself may seem insignificant to the onlooker. The gun that fires was cocked long since.

b In manic-depressive psychosis, mania or depression can appear either alone, or alternating with one another. In mania the mood is one of elation. This elation is just as pathological and unrelated to the patient's real life situation as a psychotic depression. Manic phases may alternate with depressie ones in an irregular way, but in some patients periodic swings from one state to another can keep their form and regularity almost exactly for years. The elated mood is extremely unstable. That is to say, while the patient feels 'on top of the world', or 'master of all his surveys', his emotions range rapidly through joy, sorrow, anger, or irritability. He is overdriven both physically and mentally and like a young child cannot bear frustration, or the postponement of pleasure. He may be joyously, infectiously happy one moment, but if he is denied some trival request he loses his temper. In mania, as in psychotic depression, the patient has no insight, and does not see himself as ill. On the contrary, he feels that his life has become immensely

intensified and that he has achieved freedom from all the petty restraints that once enchained him. While depressed, he felt emptied, devastated and guilt ridden. Now he feels inriched, masterful and guiltless. Yet, like the depressed person, he does not notice his egocentricity, or the effects of his unnatural mood upon his interpersonal relations; they have importance to him only in so far as he can get what he wants out of them.

Attacks of mania, like attacks of endogenous depression, tend to come on suddenly. For the first few days a person may feel irratable and have insomnia. In some cases he may at first be even quite depressed. Then rapidly the full manic picture which we have described develops. Any of the forms of mania can switch abruptly into more or less acute versions, or into a depressive psychosis.

ARGUEMENT

(D)

During the procedings on Motion to Add Prior Convictions, the Judge asked defense attorney if there was any objection to this motion, (see page 57-59 of the transcripts dated March 29, 1983). Appellant's attorney failed to raise proper objection. Judge took it upon himself to recess Court inorder to give appellant's attorney time to find the proper objection. Where upon Court was readjurned, judge asked if there was any objection from defense attorney again, and again defense attorney failed to exercise proper objection. Judge recessed the Court again and informed defense attorney of rules of Court. Where as prosecuting attorney left and returned during this recess.

When defense attorney did object on grounds of timely manner, prosecuting attorney readdressed it with then a recent case, that had no bearing on my case, that the prosecuting attorney said that the decision was that statutes prevailed the rules of Court. The case is State versus Davis, 1 CACR 5585, decided March 15, 1983.

I would like to know if the procedure in which the prosecuting attorney used was ethical on grounds of challenging the rules of Court unnecessarily, due to the fact that prosecuting attorney knew of the priors and had plenty of time to introduce them prior to the time that they were.

Appellant also wishes to know if this Davis Case is applicable to this case in such a manner as to put defense off balance. Appellant sees his case and Davis Case as being very destinctfully two different types and wonders if this was the intended purpose behind the Davis Case, and/or if this Davis Case is justly applicable to appellant's case.

The issue of allowing prosecution to clearly violate and/or chal-

lenge the rules of Court unneedlessly; I would assume it is not within the ethical code of attorneys'.

If and when the prosecuting attorney knew of prior felony convictions, prior to trial (within the alloted time under the rules and procedures of court) the rules of Court should have governed his introdution of them.

ARGUEMENT

(E)

The crimes charged to appellant, I Count Theft, Class III Felony; II Counts Burglary in the Third Degree, Class V Felony; are of a nature as to allow prosecuting attorney to convict appellant of two statutes when appellant had only committed one crime.

To derive a double conviction out of a single action would seem unconstitutional to appellant.

Inorder to prosecute for Theft it is not necessary to prove the Burglary. In prosecuting for Burglary it is necessary to prove intent of Theft. In this regard, appellant feels that the Burglary is the lesser included offense to Theft.

Therefore it would be unnecessary for the conviction of burglary to sustain Theft inorder for for appellant to be found guilty or sentenced for a single action. Unless the statutes were set up to be used in or ment to be interpreted as to allow double conviction for a single action, seeing how appellant received concurrent sentences in regard to the Theft and one Burglary.

The appellant hopes this is sufficient arguement on this issue as to allow your deliberation into the matter. Appellant has not had the material to research it nor the time in wich to research and submitt it on his own to this Court.

ARGUEMENT

(F)

Appellant feels that apointed attorney had such a burdened case load as not to give best possible defense for appellant.

If case load were not so burdened, attorney , for appellant, would of had more time to research and present appellant's case to the Court in a more presentible manner than what it was.

Appellant also wishes to point out that appointed attorney was a corporate attorney prior to practicing crimminal law. Appellant had received attorney not long after this change in law. Appellant feels defense attorney has had inadequate crimminal law experience, as noted on pages 57,58,59 of the transcripts dated March 29, 1983, to present appellant's case with any form of defense to the Court.

Attorney failed to prepare for case in such ways as to leave appellant at the mercy of the Court (ie. to many cases; inadequate crimminal law experience).

CONCLUSION

For all the above and foregoing reasons, it is respectfully requested that this Court reverse the conviction and sentence of the Appellant. Alternatively, it is requested that this Court dismiss this case due to unethical procedures endured by appellant or allow Appellant a new trial with adequate means of defense, now that appellant has received medication that gives stabilization of mental disorder.

RESPECIFULLY SUBMITTED THIS 2 DAY OF ~~NOVEMBER~~ December, 1983.

Raymond S. Bourbeau
In Proper Persona

CERTIFICATE OF MAILING

STATE OF ARIZONA)
) ss
COUNTY OF PIMA)

RAYMOND S. BOURBEAU, of 10000 South Wilmont, Tucson, Arizona, being first duly sworn upon his oath, deposes and states:

That six (6) copies of the foregoing Appellant's Supplmental Brief have this 2 day of ~~November~~ December, 1983, been mailed to the following individuals:

Mr William J. Schafer, III

Assistant Attorney General

Chief Counsel, Crimminal Division

1275 West Washington Street

Attorney for APPELLEE
One (1) copy

Clerk of The Superior Court
Arizona Court Of Appeals
1700 West Washington
Phoenix, Arizona 85007

Dated this 2 day of ~~November~~ December, 1983.

Raymond S. Bourbeau
In Proper Persona

Subscribed and sworn to before me this 2nd day of November, 1983, by RAYMOND S. BOURBEAU.

Notary

My Commission Expires Sept. 15, 1987

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ORIGINAL

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

STATE OF ARIZONA, Appellee,	)	NO. 1 CA-CR 7125
-vs-	)	MOHAVE COUNTY SUPERIOR COURT
RAYMOND S. BOURBEAU, Appellant.	)	NO. CR-5878

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DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA
MAR 8 1984
FILED
GLEN D. CLARK, CLERK
By

3-23-84

80127

CERTIFICATE OF MAILING

STATE OF ARIZONA)
) ss
COUNTY OF PIMA)

RAYMOND S. BOURBEAU, of 10000 South Wilmont, Tucson, Arizona, being first duly sworn upon his oath, deposes and states:

That six (6) copies of the foregoing Appellant's Supplmental Brief have this 2 day of ~~November~~ December, 1983, been mailed to the following individuals:

Mr William J. Schafer, III

Assistant Attorney General

Chief Counsel, Crimminal Division

1275 West Washington Street

Attorney for APPELLEE
One (1) copy

Clerk of The Superior Court
Arizona Court Of Appeals
1700 West Washington
Phoenix, Arizona 85007

Dated this 2 day of ~~November~~ December, 1983.

Raymond S. Bourbeau
In Proper Persona

Subscribed and sworn to before me this 2nd day of November, 1983, by RAYMOND S. BOURBEAU.

Notary

My Commission Expires Sept. 15, 1987

ORIGINAL

ORIGINAL

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

STATE OF ARIZONA, Appellee, -vs- RAYMOND S. BOURBEAU, Appellant.	)	NO. 1 CA-CR 7125 MOHAVE COUNTY SUPERIOR COURT NO. CR-5878

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DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA

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QUESTIONS PRESENTED FOR REVIEW

1. Were circumstances presented that required the trial court to order, sua sponte, a mental competency hearing at any stage of the proceedings?

2. Does the record support the trial court's denial of appellant's motion to suppress his statement made to police?

3. Did the trial court rule correctly in allowing the state's allegations of prior convictions?

4. Was appellant's counsel ineffective in regard to either the question of appellant's mental condition or the state's allegations of prior convictions?

5. Did appellant's sentence for burglary and theft constitute double punishment?

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STATEMENT OF THE CASE

While on parole on a California conviction of sexual assault, Appellant Raymond Stewart Bourbeau used a crowbar to pry open a door of the Bullhead City, Arizona Post Office in the early morning hours of November 8, 1982. (R.T. of Apr. 25, 1983, at 8; Statement, attached as Exhibit 1 to Minuty Entry of Mar. 29, 1983; Indictment, filed Dec. 22, 1982.) He went inside, searched through the office, and took stamps and mail containing credit cards. (Statement, id.) On the same date, appellant entered the Riviera, Arizona Post Office, but was interrupted in his attempt to take anything of value when he observed a Maricopa County Sheriff Deputy in the office. (Statement, supra.) He fled the scene and avoided custody until he was arrested on December 14, 1982. (R.T. of Mar. 29, 1983, at 4-5.) Appellant was charged by grand jury indictment with one count of theft, a class 3 felony, and two counts of burglary, class 5 felonies, arising out of the burglaries of the Bullhead City and Riviera Post Offices, as well as the theft of currency and stamps. (Indictment, filed Dec. 22, 1982.)

On January 4, 1983, the state filed an addendum to the indictment of appellant's prior 1979 conviction of attempted theft in Mohave County.

Appellant's case was set for a change of plea, but on the date set for hearing, appellant escaped from custody. (R.T. of Mar. 29, 1983, at 54-55.) He was reapprehended on February 15, 1983. (Presentence Report, dated Apr. 25, 1983, at 5.)

On March 11, 1983, the state filed an additional allegation that the present offenses had been committed while appellant was on parole from a California conviction of unlawful sexual intercourse. On March 25, 1983, the state added an additional allegation of the escape charge pursuant to State v. Hannah, 126 Ariz. 575, 617 P.2d 527 (1980).

On March 29, 1983, defense counsel filed a motion to suppress appellant's tape recorded confession. Also on March 29, 1983, the state filed its allegation of prior conviction related to appellant's California conviction of unlawful sexual intercourse.

A hearing was held on the motion to suppress, as well as on the allegations of the Hannah prior and the California conviction, on March 29, 1983, before the Honorable Leonard C. Langford, Mohave County Superior Court.

Following the hearing, appellant's motion to suppress was denied and the state's request to add addenda to the indictment was granted.

On March 30, 1983, appellant appeared before the court with counsel and indicated his desire to enter a guilty plea. Appellant agreed to plead guilty to all of the charges with the judge's discretion on sentencing, and the state agreed in exchange to dismiss the allegation of the prior conviction of unlawful sexual intercourse and the escape offense alleged pursuant to State v. Hannah, supra. (R.T. of Mar. 30, 1983, at 5.) The trial court accepted the plea and, following a presentence investigation, appellant was sentenced on April 25, 1983. The previous night appellant had made an apparent attempt to commit suicide, but the court ascertained that appellant wished to proceed and imposed sentence. (R.T. of Apr. 25, 1983, at 3.) As to Count I, theft, a class 3 felony with one prior conviction, the court imposed a sentence of the presumptive term of 7 1/2 years. (Id.) As to Count II, third-degree burglary, a class 5 felony, the sentence was the presumptive sentence of 3 years. The sentences on Counts I and II were ordered to run concurrently. (Id. at 9.) As to Count III, burglary in the third degree with one prior felony conviction, the court imposed the presumptive sentence of 3 years, to run consecutive of the sentences imposed in Counts I and II. (Id.) The trial court specifically found that, in addition to the prior conviction of attempted theft alleged by the state, that

appellant did in fact have another prior conviction out of California for unlawful sexual assault. As an additional aggravating circumstance, the court found that appellant was on parole at the time that he committed the present offenses. (Id. at 8.)

Counsel on appeal filed a brief complying with Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Appellant then filed a supplemental brief in propria persona. This Court has jurisdiction to hear this appeal pursuant to Ariz.Rev.Stat.Ann. §§ 12-120.21(A)(1), 13-4031, and -4033.

ARGUMENTS

I

THERE WERE NO CIRCUMSTANCES PRESENTED TO GIVE THE TRIAL COURT A GOOD-FAITH DOUBT THAT APPELLANT WAS OTHER THAN MENTALLY COMPETENT TO VOLUNTARILY GIVE STATEMENTS TO POLICE AND TO ENTER A GUILTY PLEA; UNCERTAINTY, IF ANY, ABOUT APPELLANT'S COMPETENCY TO BE SENTENCED SHOULD BE SETTLED AFTER HEARING UPON REMAND.

In his supplemental brief, appellant has argued throughout that his mental capacity was in question at each stage of the proceedings below. Although no circumstances appear of record prior to the sentencing hearing which would indicate other than appellant's competence, appellant argues that the prosecution should not have proceeded at any stage prior to a mental competency examination.

Rule 11.1, Arizona Rules of Criminal Procedure, provides:

> A person shall not be tried, convicted, sentenced or punished for a public offense while, as a result of the mental illness or defect, he is unable to understand the proceedings against him or assist in his own defense.

(Emphasis supplied.)

Appellant's right to a mental examination depended upon whether there were reasonable grounds upon which an examination and hearing could have been ordered. State v. Steelman, 120 Ariz. 301, 585 P.2d 1213 (1978); State v. Bishop, ____Ariz.____, 667 P.2d 1331 (Ct.App. 1983); see also Rule 11.3(a), Arizona Rules of Criminal Procedure. The test of whether a trial court should order, sua sponte, a mental competency examination and hearing is whether the trial judge entertains or reasonably should entertain a good-faith doubt as to the defendant's ability to (1) understand the nature and consequences of the waiver; (2) participate intelligently in the proceedings; or (3) make a reasoned choice among the alternatives presented. Chavez v. United States, 656 F.2d 512 (9th Cir. 1981); Sailer v. Gunn, 548 F.2d 271 (9th Cir. 1977); Evans v. Raines, 534 F.Supp. 791 (D.Ariz. 1982). A good-faith doubt rises when there is "substantial evidence" of incompetence. United States v. Veatch, 647 F.2d 995, 1001 (9th Cir. 1981); United States v. Clark, 617 F.2d 180, 185 (9th Cir. 1980). Evidence of incompetence may include the

existence of the history of the irrational behavior, medical opinion and the defendant's demeanor during proceedings. See Drope v. Missouri, 420 U.S. 162, 180, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975); Moore v. United States, 464 F.2d 663, 666 (9th Cir. 1972).

The existence of a mental aberration does not, however, in every case provide "substantial evidence" that a criminal defendant is unable to understand the nature of the proceedings against him, to assist in his defense or to make rational choices among alternatives. A defendant may be deluded but still in control, State v. Fayle, 134 Ariz. 565, 658 P.2d 218 (Ct.App. 1982), and a history of long use of drugs or alcohol does not necessarily raise a question as to mental competence to plead guilty or stand trial. State v. Salazar, 128 Ariz. 461, 626 P.2d 1093 (1981) (heroin addiction); State v. McKinny, 108 Ariz. 604, 503 P.2d 946 (1972) (drug and alcohol abuse).

Obviously, the appellant in this case is capable of exhibiting a high level of competence in understanding the legal process, as is shown in his supplemental brief. While appellant's behavior immediately prior to sentencing, including suicide attempts, gives a strong suggestion of mental instability at that time, it cannot be assumed that at the time appellant made statements to police officers and entered his guilty plea that he was other than entirely

competent to understand the nature of the proceedings, to assist in his own defense, and to make rational choices among alternatives. A trial judge's actions on the question of competency should be judged according to the circumstances and information which the record shows was available to the judge at the time in question, not based on circumstances as they might appear at a later date. State v. Fayle, supra.

To examine whether the trial judge in this case should have, sua sponte, ordered a mental competency examination in connection with appellant's statements to police it is appropriate to look at the information that was provided to the judge at the hearing on the motion to suppress. Appellant testified regarding his state of mind at the time he admitted to Detective Holmes his commission of the Bullhead City and Riviera Post Office offenses. Appellant testified that he was emotionally upset on the day of his arrest because, in addition to the instant offenses, he realized that his arrest meant that he would have to do further time on his conviction in California, and that this further hampered his efforts to straighten out a relationship with his girl friend in Bullhead City. (R.T. of Mar. 29, 1983, at 28.) He also stated he was upset because his son's friend, Steve Squillante, had also been charged as a participant in the crimes. (Id. at 31.)

Appellant testified he was under stress from lack of sleep but had not been drinking that day. (Id. at 37-38.) Finally, the following was elicited from appellant regarding any history of mental problems:

> Q. Do you have any history of mental problems?
>
> A. Yes.
>
> Q. Have you been institutionalized?
>
> A. No.
>
> Q. What was the nature of your mental problems in the past?
>
> A. Depression, anxiety, suicide.
>
> Q. Have you ever received doctors' care for this?
>
> A. I was seeing a psychiatrist in L.A. County.
>
> Q. When was that?
>
> A. '79 and '80.

Appellant describes the condition for which he had received treatment in 1979 and 1980 as extreme depression or anxiety. (Id. at 50.) However, he admitted that at the time of his arrest in this case in 1982, he was no longer under prescribed medication. (Id.)

The references, which have been described above, form only a small part of the hearing that the trial judge conducted on the question of the voluntariness of appellant's confession. The remainder of appellant's

testimony does not give any clue that appellant is other than alert, intelligent, and clearly competent to engage in the proceedings. The information that appellant had received treatment for depression and anxiety 2 years prior to the offenses in this case was no clear signal to the trial judge that a mental competency examination should be ordered sua sponte.

Similarly, the record provides no substantial evidence that would give the trial court reasonable grounds to believe that appellant was other than mentally lucid and competent at the guilty plea proceedings. He responded intelligently to the judge's exchange of questions and answers (R.T. of Mar. 30, 1983); he was not under medication (id. at 10); he was not suffering from lack of sleep (id.).

Appellant has asserted in his brief that he is subject to mood swings. However, there is no indication in the record of the proceedings below that his judgment was impaired by any such mood swing except at the time of sentencing. The record shows that an original sentencing hearing was postponed because appellant tried to commit suicide and that appellant again tried to commit suicide 1 or 2 days prior to the second sentencing hearing date. (Minute Entry of Apr. 25, 1983.) The trial court observed that appellant "looked somewhat dejected and perhaps

subdued from an emotional standpoint." (R.T. of Apr. 25, 1983, at 3.) However, it was ascertained that appellant was not on medication and that he wished to continue with the sentencing proceedings. (Id. at 3-4.) The court was informed that appellant had previously been treated with "the drug L & L, which is a mood elevative drug which tends to stabilize people whose moods change rapidly and whom [sic] become depressed . . . ." (Id. at 5.)

The trial court inquired of counsel whether a psychiatric evaluation was required in regard to any prior proceedings but counsel indicated that it was not, and asked the court to take mental condition into consideration in imposing sentence. (R.T. of Apr. 25, 1983, at 6.)

The state suggests that, while counsel may have had his client's best interest in mind in protecting the plea agreement, with the state's concomitant agreement to drop several allegations of priors, it may have been better to postpone sentencing until appellant's mental competency to participate in sentencing proceedings was determined. If the Court finds that appellant's mental competency to be sentenced is in question, an appropriate procedure would be to remand the matter for hearing on the question of appellant's competency to be sentenced. State v. Morris, 121 Ariz. 364, 590 P.2d 480 (Ct.App. 1979); Evans v. Raines, 705 F.2d 1479 (9th Cir. 1983). At such time,

appellant would have the opportunity to present pertinent medical records and reports which he has filed inappropriately with this Court, and expert testimony could take the place of appellant's own exposition on depressive illness and reactions.

II

THE RECORD FULLY SUPPORTS THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION TO SUPPRESS HIS STATEMENT MADE TO POLICE.

The state has taken the position in this appeal that there is no error except for the possible necessity that the case be remanded for a mental competency examination in regard to sentencing.[1]

As the state has also contended that appellant's guilty plea is valid, the question of the voluntariness of appellant's confession is also moot. Appellant waived his objections to all nonjurisdictional defects when he admitted his guilt to the trial court in open court. State v. Smith, 123 Ariz. 231, 599 P.2d 187 (1979). However, appellant's brief has brought into question the correctness of the trial court's denial of the motion filed by

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1. The state has attempted to examine this case for any irregularities and would point out that there is no written plea agreement of record. However, in the absence of any prejudice, the lack of a written plea agreement is not a basis for reversal. State v. Morris, 115 Ariz. 127, 564 P.2d 78 (1977); State v. Lee, 112 Ariz. 283, 541 P.2d 383 (1975); State v. Mitchell, 27 Ariz.App. 309, 554 P.2d 905 (1976).

appellant's counsel to suppress the tape recorded statement which appellant gave to Detective Holmes. (See Statement attached as Exhibit 1 to Minute Entry of Mar. 29, 1983.)

On appeal, appellant argues that his confession should have been found to be involuntary because various circumstances created stress which affected his state of mind. He contends that he was suffering from a lack of sleep due to driving back and forth between Arizona and California. He argues that his state of mind was poor because of trouble in his relationship with his girl friend which was exacerbated by the present arrest. According to appellant, the arrest of a friend was a significant factor in his decision to confess, as he wished to protect his friend. He claims that Detective Holmes told him that if he admitted to the post office burglaries, he could spend his prison time in Arizona close to his girl friend, and not be extradited to California, and that the detective implied he probably would not receive more than 5 years imprisonment.

A hearing was conducted on appellant's motion to suppress. Testimony was heard from both appellant and Detective Robin Holmes.

When he testified before the trial court, appellant said that he was emotionally upset the day of the arrest because he had been picked up on a California warrant, knew

he was going to go back and do some time, and was worried about straightening out his relationship with a girl down in Bullhead. (R.T. of Mar. 29, 1983, at 28.) He said that he was questioned by officers about the Bullhead City and Riviera Post Office burglaries prior to receiving Miranda[2] warnings. (Id. at 29-30.) According to appellant, the officers discussed the involvement of appellant's friend, Steve Squillante, which worried appellant because he wished to protect this friend. (Id. at 31-32.) He testified that Detective Holmes discussed with him his choices of confessing and staying to serve time in Arizona or going back on the California warrant. (Id. at 32.) He testified that one of the reasons he confessed was to protect Steve. (Id. at 34.) At the same time, appellant admitted that there were no promises regarding possible punishment. (Id.) He also testified that he did not feel that the officers deliberately placed him under duress. (Id. at 35.) He stated that he thought the officers were sincerely trying to help him. (Id. at 36.) On cross-examination, appellant admitted that one of the reasons he confessed was because he felt bad that postal employees were going to have to pay for the $8,000.00 worth of missing stamps. (Id. at 37.) He

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2. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

admitted that he never told Officer Holmes that he confessed to protect Steve Squillante. (Id.) His testimony shows that he was never threatened or physically coerced in any way after his arrest, and that he was not under the influence of alcohol or medication. (Id.) The record shows that although he had been traveling between California and Arizona, he was able to sleep after his arrest prior to talking to Detective Holmes between 4:00 and 7:30 in the evening. (Id. at 49.)

It became apparent during the testimony of appellant that he had extensive prior experience with procedures upon arrest and had been advised of his Miranda rights more than a half dozen times. (Id. at 41-42.) He admitted that prior to allowing appellant to make a statement, Detective Holmes advised appellant of his Miranda rights. (Id. at 42.) He explained that Detective Holmes had not promised him any period of punishment, but had given him a criminal code sentencing chart similar to one that was later provided him by his attorney. (Id. at 45-46.) He testified:

> Q. Did Detective Holmes make you any promise before the taped interview?
>
> A. No, he told me that he didn't make no promises. All he could do -- the way the conversation was going is he told me that he couldn't promise me that I was going to get that and I told him I understood that. The only thing he was trying to figure out was probably what was going to happen through cooperation. That's all it was assumed.

(Id. at 46.)

According to appellant's testimony, Detective Holmes advised appellant of his Miranda rights prior to taping appellant's statement and, as appellant's testimony shows, appellant understood those rights. (Id. at 47.)

Detective Robin Holmes also testified before the trial court. Detective Holmes testified that he first came into contact with appellant at around 7:00 or 7:30 on the evening of the arrest. (Id. at 5 and 20.) According to the Detective, he went to appellant's cell and advised him that credit cards stolen from the Bullhead City Post Office had been discovered in appellant's possession and that this evidence linked him to the burglary at the Bullhead City Post Office. (Id. at 5.) After Detective Holmes made this statement to appellant, he asked appellant if appellant wanted to make a statement. Appellant stated he wished to make a phone call. (Id. at 6.) After the phone call, appellant indicated he wished to make a statement. (Id. at 7.) At that time and prior to taking appellant's statement, the detective read appellant his Miranda rights and ascertained that he understood them. (Id. at 7.) Further testimony from the detective shows that discussions prior to the tape recorded statement were done largely at appellant's initiative. (Id. at 20.) He was concerned about where he would be placed to serve a sentence because of having testified against an individual named Emery, and

wished to try to secure protective custody. (Id. at 20.) He asked Detective Holmes if he would call the county attorney to see what kind of plea bargain could be arranged. (Id. at 21.) At no time did Detective Holmes advise appellant that he would receive only a 5-year sentence. (Id.) Prior to making the taped interview, appellant did not appear scared. (Id. at 24). There were no promises made that he would not be returned to California on the arrest warrant if he would confess. (Id.)

A trial court's ruling on the admissibility of a confession should be upheld on appeal absent a finding of clear and manifest error. State v. Crivellone, No. 5681 (Ariz.Sup.Ct., Dec. 2, 1983). The state must show by a preponderance of the evidence that a confession has been voluntarily made. (Id.) In assessing that evidence, the trial court must look to the totality of the circumstances surrounding the giving of the confession. State v. Montes, 136 Ariz. 491, 667 P.2d 191 (1983); State v. Graham, 135 Ariz. 209, 660 P.2d 460 (1983).

In this case, appellant admitted that Detective Holmes had given him no promises prior to taking his tape recorded statement. (R.T. of Mar. 29, 1983, 46.) Appellant's testimony that any coercion that he felt was due mainly to factors which had nothing to do with police, but rather included his concern over his relationship with his girl friend, his concern about the fate of his accomplice, his

worries about extradition and protective custody, and his remorse over the fact that post office employees would have to pay $8,000.00 because of the items he had stolen. The record shows that these pressures were generated by appellant and not through the actions of police officers at any time after his arrest. The record shows that there was discussion between appellant and Detective Holmes regarding these factors prior to Detective Holmes giving appellant formal Miranda warnings. However, voluntariness of a confession and admissibility because of a Miranda violation are two separate inquiries. State v. Montes, supra. It is true that any statement made by a person in custody under questioning of law enforcement officials is not admissible if made prior to the advice of Miranda rights. State v. Montes, supra; Michigan v. Moseley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975). However, statements given after advice of Miranda warnings can be shown to be voluntary and admissible. State v. Montes, supra; United States v. Toral, 536 F.2d 893 (9th Cir. 1976).

Here, there is no attempt to admit into evidence any statements made by appellant prior to his receipt of the Miranda warnings. The record shows that appellant felt upset and anxious over factors apart from any activities of the police. He testified that he understood that police were making no promises. Prior to giving a tape recorded

statement, in which he fully inculpated himself, appellant was advised of and understood his Miranda rights. Appellant is an intelligent individual and had been advised of Miranda warnings more than half a dozen times in the past.

Under all of these circumstances, the trial court correctly judged that appellant's statement, given to Detective Holmes, was not the result of any psychological or physical coercion, but was voluntarily given, after Miranda warnings. The state submits that a defendant may have many reasons for choosing to make a voluntary statement, including his personal assessments of the probability of punishment, his remorse over victims of the crime, or his desire to protect an accomplice. While these circumstances may be stressful for an individual, they do not make a confession involuntary.

The record provides ample evidence that supports the trial court's determination that appellant's confession, given after Miranda warnings, was voluntary.

III

THE TRIAL COURT RULED CORRECTLY IN ALLOWING THE STATE'S ALLEGATIONS OF PRIOR CONVICTIONS.

The state would point out initially that, inasmuch as the prosecution dropped all allegations of prior convictions, except the 1979 attempted theft, in accordance with the plea

agreement, the question of the trial court's ruling allowing additional allegations is moot. However, the court's ruling is also correct under the law.

The question of the state's motions to add prior convictions was considered by the trial court on March 29, 1983. Prior to this hearing, the state had filed the following motions to add allegations of prior convictions as addenda to the indictment: January 4, 1983 (1979 conviction of attempted theft in Mohave County, Arizona); March 11, 1983 (allegation that present offense committed while on parole); March 25, 1983 (allegation of escape as a Hannah[3] prior); March 29, 1983 (allegation of prior California conviction of unlawful sexual intercourse).

There was no objection to the allegation filed January 4, 1983, nor to the Hannah prior of escape. The remainder of the allegations were objected to by defense counsel on the basis of untimeliness under Rule 16.1(b), Arizona Rules of Criminal Procedure. (R.T. of Mar. 29, 1983, at 59.)

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3. State v. Hannah, 126 Ariz. 575, 617 P.2d 527 (1980).

Although Rule 16.1(b) provides generally that all pretrial motions be made at least 20 days prior to date set for trial, Ariz.Rev.Stat.Ann. § 13-604(K) specifically states that the trial court may, in its discretion, allow allegations of prior convictions, dangerous nature, or commission while released on an offense, at any time prior to trial, provided that at the time of allegation the state is able to provide the defense with the supporting documentation. See also Rule 13.5(a), Arizona Rules of Criminal Procedure.

At the hearing in this matter, counsel for the state explained that documentation related to the California prior had not been available in time to meet the Rule 16.1(b) deadline. However, the motion to add allegations related to that conviction had been made as soon as possible after receipt of the necessary documentation and the defense, because of ongoing negotiations, had been fully aware of the state's intention to file the allegations well before the time limit set by rule. (R.T. of Mar. 29, 1983, at 60.) State v. Davis, ___ Ariz.____, 672 P.2d 480 (Ct.App.) was relied upon by the trial court (R.T. of Mar. 29, 1983, at 61) and is directly applicable to this case. In Davis, the court observed that while Rule 13.5(a), Arizona Rules of Criminal Procedure, requires that an indictment may be amended within the time

limits set by Rule 16.1(b) (20 days prior to the first trial setting), the comment to Rule 13.5(a) states:

> Because the prosecutor is often unable to obtain a rap sheet at the time the prosecution is commenced, he is given some leeway to add an allegation of a previous conviction to the charge.

The court in State v. Davis, supra, went further and found that Ariz.Rev.Stat.Ann. § 13-604(K) appears to be in conflict with Rule 13.5(a) and held that, to the extent there was a conflict, the statute would prevail and allegations of prior convictions may be allowed, at the trial court's discretion, at any time before trial.

Notably, the Davis opinion also considered the exercise of the trial court's discretion and found that, because the defense had ample notice of the state's intention to allege the priors, there was no abuse in the trial court order allowing the state to do so.

The record in this case supports the trial court's ruling allowing the additional allegations of prior convictions. State v. Davis, supra. Through plea negotiations, the defense was aware prior to February 15, 1983, the date of the initial change of plea hearing, of the fact that allegations related to the California priors would be made. The trial court's ruling allowing the allegations on March 29, 1983, after the state had received the necessary documentation, was not an abuse of discretion.

IV

APPELLANT'S COUNSEL DEMONSTRATED COMPETENCE IN HIS HANDLING OF THE QUESTION OF APPELLANT'S MENTAL CONDITION AND IN HIS RESPONSE TO THE STATE'S ALLEGATIONS OF PRIOR CONVICTIONS.

Appellant has asserted that the trial judge should have taken appellant's representation out of the hands of appointed counsel because of counsel's demonstrated incompetence.

In Arizona, the test applied to determine whether there has been effective assistance of counsel is whether counsel has demonstrated at least minimal competence. State v. Watson, 134 Ariz. 1, 653 P.2d 651 (1982). Not all areas of counsel are harmful and reversal is not required in the absence of prejudice. (Id.) The burden of establishing ineffectiveness is on the claimant, and proof of ineffectiveness must be a demonstrable reality rather than a matter of speculation. State v. McDaniel, 136 Ariz. 188, 655 P.2d 70 (1983).

Appellant's major contention in regard to his counsel's representation is in regard to the allegation of prior convictions. As has already been discussed, the trial court's ruling in this regard was correct, and the fact that counsel was not successful in objecting to the allegations of the priors is not an indication of any lack of competence. The record appears to indicate that the

trial judge was unaware of the case of State v. Davis, supra, which had been issued less than 15 days prior to the hearing, and recessed court while counsel and the court discussed the matter. This does not indicate any incompetence on the part of appellant's counsel who made the objection of timeliness in regard to the allegations of prior conviction.

The state would submit in addition that, although it may be necessary to remand this case for a determination of mental competency to be sentenced, trial counsel's decision to handle the case so that appellant continued to receive the benefits of the plea bargain which had been negotiated and to urge the court to consider any mental condition in connection with sentencing, rather than to nullify the plea proceedings, is a tactical decision made on appellant's behalf and does not show ineffectiveness. See State v. Rodriguez, 126 Ariz. 28, 612 P.2d 484 (1980). Appellant should not receive the benefits of his trial counsel's strategy in maintaining the effectiveness of his plea with its concomitant benefits, in this case the dismissal of a number of prior conviction allegations, and then complain on appeal that counsel should have followed a different tact.

Trial counsel in this case demonstrated the competence necessary under the test in Arizona law and there is no reversible error in this regard.

V

APPELLANT'S SENTENCE FOR BURGLARY AND THEFT DID NOT CONSTITUTE DOUBLE PUNISHMENT.

Appellant has argued that his convictions and sentences for both the burglary of the Bullhead City Post Office and the Riviera Post Office, as well as his conviction of theft in regard to stamps and other items stolen in those burglaries, violate Arizona's prohibition against double punishment. He argues that because the intent to commit the theft is an element in the burglary charge, that the theft is a lesser-included offense of burglary and that he therefore cannot be punished for both. This is not in fact the case.

In State v. Rybolt, 133 Ariz. 276, 650 P.2d 1258 (Ct.App. 1982), the defendant argued that his convictions for burglary as well as sexual assault violated the double punishment statute, Ariz.Rev.Stat.Ann. § 13-116. He argued that the common evidence of the intent to commit sexual assault was an essential element of both the burglary and the sexual assualt convictions. Applying the identical elements test, the Court rejected his contention, and stated:

> In the instant case, the various states of the mind which underlay appellant's actions during the time of the offenses are discreet and distinguishable. First, when he entered or remained in the residences with the

> intent to commit theft or any felony (e.g., sexual assault) therein, he was responsible for the burglaries. A.R.S. § 13-1508. Second, when he thereafter intentionally or knowingly engaged in non-consensual sexual intercourse or oral sexual contact with the victims, he was responsible for sexual assault. A.R.S. § 13-1406. We find no violation of A.R.S. § 13-116.

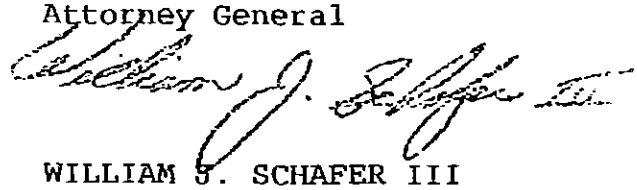
133 Ariz. at 281, 650 P.2d at 1263. The Court's reasoning in State v. Rybolt, supra, is directly applicable to this case. When appellant entered the post offices with the intent to commit theft, he was guilty of burglary. Thereafter, when he intentionally took property belonging to the United States Post Office or its patrons, he committed theft. There is no double punishment in violation of Ariz.Rev.Stat.Ann. § 13-116 in this case.

CONCLUSION

Questions, if any, about appellant's mental state at the time of sentencing should be resolved in a hearing upon remand for that specific purpose. In regard to all other aspects of the case, including the voluntariness of appellant's confession, the entry of his guilty plea, the allegations of prior convictions, the effectiveness of counsel, and questions of double punishment, the state submits that no reversible error occurred.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General



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A F F I D A V I T

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

DIANE D. HIENTON, being first duly sworn upon oath, deposes and says:

That she served the appellant and the attorney for the appellant in the foregoing case by forwarding one (1) copies of APPELLEE'S ANSWERING BRIEF, in a sealed envelope, first class postage prepaid, and deposited same in the United States mail, addressed to:

RAYMOND S. BOURBEAU
ACTC-T-Tents #39451
10,0000 South Wilmot
Tucson, Arizona 85777

CLAUDE D. KELLER
541 Oak Street
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Attorney for APPELLANT

this 8th day of March, 1984.

Diane D. Hienton
DIANE D. HIENTON

SUBSCRIBED AND SWORN to before me this 8th day of March, 1984.

Chris L. Piske
CHRIS L. PISKE
NOTARY PUBLIC

My Commission Expires:

October 28, 1984

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