

COURT OF APPEALS, DIVISION ONE

BRIEFS

SECTION 2

1 CA-CR          6700

STATE OF ARIZONA

v.

DANNY SHAWN GRAHAM,

MARICOPA COUNTY  
SUPERIOR COURT  
NO.                  CR-127635

TRANSMITTAL DATE



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## ARGUMENT I.

THE TRIAL COURT FAILED TO ADVISE THE APPELLANT OF HIS CONSTITUTIONAL RIGHTS, OF THE CONSEQUENCES OF PLEADING GUILTY, OR TO DETERMINE THE VOLUNTARINESS AND INTELLIGENCE OF THE PLEA.

The appellee in its answering brief relies on State v. McVay, 131 Ariz. 369, 641 P.2d 857 (1982), where the Arizona Supreme Court, in a unanimous decision, held: "When it may be ascertained from an expanded record that the defendant was aware of his rights, the trial judge's failure to recite the litany of his waiver is not reversible error." (Emphasis added). Citing State v. Darling, 109 Ariz. 148, 506 P.2d 1042 (1983), and State v. Levario, 118 Ariz. 426, 577 P.2d 712 (1978). It is submitted that the court in McVay, supra, was only establishing that substance would control over form. The failure to follow a recommended "litany" for a change of plea to be found in a judge's bench book, does not create reversible error. McVay did not establish a rule of law that if a defendant signs away all of his rights in a plea agreement, the trial judge need do no more than personally inquire of the defendant, "Did you sign it? Do you understand it?" Such a construction would be tantamount to a judicial nullification of Rules 17.2, 17.3 and 17.4, Arizona Rules of Criminal Procedure, thereby absolving a trial judge from the requirement that he "shall address the defendant personally" as to the issues cited in each section.

In the same fashion, appellee relies on State v. Wesley, 131 Ariz. 246, 640 P.2d 177 (1982), a unanimous supreme court case for the proposition that: "It is sufficient if the trial court ascertains that the defendant has read the constitutional rights that are recited in the plea agreement, that the defendant has had his attorney explain the plea agreement to him, and that the defendant voluntarily waives those rights." (Appellee's Answering Brief at p. 4). The same procedural chain of events were stated as a fact in Wesley, supra. In support of that position,

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the court used the following language, "if it can be ascertained from an examination of the record that the defendant was aware of his rights, the judge's error in not advising him thereof shall be regarded as technical rather than reversible. (Citations omitted)."

It is submitted to this court that the logical inference to be drawn from the above language is that a satisfaction of spirit of Rules 17.2, 17.3, 17.4, Arizona Rules of Criminal Procedure, can be found from the record as opposed to the merely spoken word. The purpose of the requirement in each rule that the court "shall address the defendant personally" is to ensure compliance with the requirements of Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969), wherein Justice Douglas noted: "Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality." There can be no better insurance of understanding than that to be found in the repartee between the trial court and defendant concerning the waiver of constitutional rights, the voluntariness of his plea, and its consequences.

The novelty of this case is that the trial court in fact absolved itself from the "litany" of a guilty plea proceeding by obtaining an affirmative response from the defendant to the question, "You have carefully been over this agreement with Mr. Wright at least twice this morning; is that not true." (RT of 10/29/84 at p. 4). Whereupon the court then adopted "the procedures had before Judge Coulter regarding the agreement, the factual basis, the promises, the alternatives. The court thereby deprived itself of the opportunity to learn by personally addressing the defendant, as per Rule 17.3, that he denied a factual basis for his plea to Burglary as "he entered a plea of guilty to the present charges because his attorney had advised him that it carried a lesser sentence." (Photostated instrument 19b, Record on Appeal).

**ARGUMENT II.**

**THE APPELLANT SHOULD HAVE RECEIVED CREDIT FOR ALL TIME ACTUALLY SPENT IN CUSTODY PRIOR TO SENTENCING ON EACH OFFENSE.**

The appellee in its answering brief acknowledged that the appellant should receive 144 days pre-sentence incarceration credit with respect to the concurrent sentence imposed in Count II, Theft.

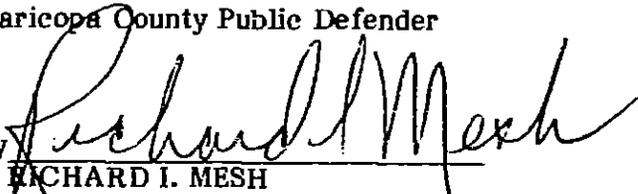
**CONCLUSION**

Based upon Argument I, this court should remand the appellant's conviction to the trial court for a determination as to the voluntariness of the appellant's plea.

Based upon Argument II, if no relief is granted the appellant pursuant to Argument I, then this court should modify the sentence as to Count II, Theft, a class 3 felony with one prior conviction, to reflect that the appellant is entitled to credit on that count for 144 days of pre-sentence custody.

Respectfully submitted,

ROSS P. LEE  
Maricopa County Public Defender

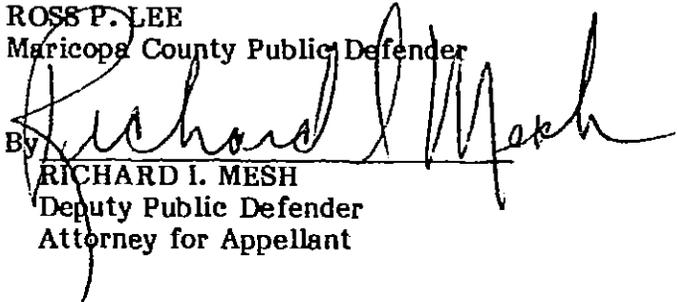
By   
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TWO COPIES of Appellant's Reply Brief mailed this 16 day of August, 1984, to ROBERT K. CORBIN, Attorney General of Arizona, 1275 West Washington, Criminal Division - Second Floor, Phoenix, Arizona 85007.

ONE COPY of Appellant's Reply Brief mailed this 16 day of August, 1984, to DANNY SHAWN GRAHAM, ADOC #40438, ACTC-P, Box 3200 (Santa Cruz), Goodyear, AZ 85338.

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