

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY

STATE OF MONTANA,)
)
 Plaintiff,)
)
 vs.) No. DC 07-907
)
LIONEL SCOTT ELLISON,)
)
 Defendant.)
_____)

TRANSCRIPT OF PROCEEDINGS

Courtroom - Dept. No. 3
Yellowstone County Courthouse
Billings, Montana
August 27, 2008 - 1:30 p.m.

HON. SUSAN P. WATTERS, PRESIDING JUDGE
Hearing on motion to
withdraw guilty plea

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1 PROCEEDINGS

2 THE COURT: Court is in session. You may be
3 seated.

4 Court calls DC 07-907, State of Montana
5 versus Lionel Scott Ellison, and this is the time set for
6 hearing on the defendant's motion to withdraw his plea of
7 guilty. And the State is represented by Scott Twito, and
8 defendant is present and represented by Chuck Watson. And
9 who are you, sir?

10 MR. WADDELL: Russ Waddell, Your Honor, I'm
11 co-counsel.

12 THE COURT: Okay. Thank you.

13 Mr. Watson, you may proceed.

14 MR. WATSON: Thank you, Your Honor. I would
15 like to call Lionel Ellison to the stand.

16 LIONEL SCOTT ELLISON,
17 having been first duly sworn to state the truth, the whole
18 truth and nothing but the truth, testified as follows:

19 DIRECT EXAMINATION

20 BY MR. WATSON:

21 Q. Go ahead and state and spell your name for the
22 record, please, sir.

23 A. Lionel Scott Ellison. L-i-o-n-e-l, Scott,
24 S-c-o-t-t, Ellison, E-l-l-i-s-o-n.

25 Q. Let me show you what's been marked as

1 Defendant's Exhibit A and ask you whether you are familiar
2 with this document?

3 A. Yes. I saw it the day that the -- Mr. Michaels
4 handed it to me on the podium and said to sign here.

5 Q. All right. When's the first time you saw that
6 piece of paper?

7 A. On the podium or whatever, stand.

8 Q. You know what it is?

9 A. Legal papers.

10 Q. Okay.

11 MR. WATSON: Your Honor, I'd move for the
12 admission of Defendant's Exhibit A, which is a copy of the
13 Acknowledgment of Waiver of Rights by Plea of Guilty.

14 THE COURT: Any objection?

15 MR. TWITO: No objection, as it's part of the
16 Court file.

17 THE COURT: A is admitted.

18 MR. WATSON: Thank you, Your Honor.

19 Q. (By Mr. Watson) Did you read that document
20 before you signed it?

21 A. No, I did not.

22 Q. All right. Tell the Judge, if you will, what
23 your understanding was when you got to court with regard to
24 what you would be pleading to?

25 A. I understood that we were going in there, they

1 were trying, you know, charge with me arson, but they were
2 going to lower it down or something, and that it was going
3 to be completely washed off my record or some words he used,
4 washed off my record after a certain amount of time.

5 Q. Did the word deferred ever come up?

6 A. That's the word he used, yes.

7 Q. Did you and Mr. Michaels ever have a
8 conversation about the fact that you had a criminal record?

9 A. Yes.

10 Q. Did you tell Mr. Michael that you had a
11 criminal record?

12 A. Yes, I did.

13 Q. But you came to court believing that you were
14 going to get a deferred imposition of sentence?

15 A. Yes.

16 Q. Now, first of all, how is your hearing?

17 A. It's pretty bad. That's why I turn my head all
18 the time to hear you.

19 Q. This Court has jurisdiction over your case, but
20 that jurisdiction is shared by any other District Court
21 judge in the State, and as a matter of fact, your case was
22 not, your guilty plea was not taken by this Court, but was
23 taken by a different judge; do you recall that?

24 A. Yes, I do.

25 Q. And what do you recall about the person who

1 took your plea?

2 A. It was a man.

3 Q. Can you tell the Court whether you were able to
4 hear everything that the Judge asked you or explained to you
5 during that process?

6 A. I didn't understand everything, no. I heard
7 parts of it, and Michaels kept telling me to say yes on
8 certain things, yes.

9 Q. Now, I have reviewed a transcript of that
10 hearing. Did the Judge ask you whether you were satisfied
11 with your lawyer?

12 A. Yes, he did.

13 Q. And what happened then?

14 A. I didn't say anything for a little bit, and
15 that's when Michaels said this is where you're supposed to
16 say yes.

17 Q. Now, that is actually in the record, correct?

18 A. I've never seen the record, but that's what he
19 said.

20 Q. How were you feeling at that point with regard
21 to whether you were doing the right thing?

22 A. I wasn't sure if I was doing the right thing.
23 At that time I was told that was the best, you know, to keep
24 my mom out of jail.

25 Q. Did you set fire to Dee Ames' automobile?

1 A. No, I did not.

2 Q. Why did you plead guilty?

3 A. Jeff Michaels told me I --

4 Q. Well, I don't want to go into specifically -- I
5 mean, there's a way to answer that question without going
6 into what Mr. Michael told you. But what was your belief at
7 the time that you entered the guilty plea with regard to
8 what would happen if you didn't plead guilty?

9 A. If I didn't plead guilty, it was going to go to
10 a felony, they were going to charge my mother with witness
11 tampering and myself with witness tampering.

12 Q. And what would that charge have been based on,
13 as far as you understood?

14 A. A former employee supposedly came forward,
15 that, I don't even remember him, and then because my mother
16 had brought Dee Ames' children, Jeff Michaels had told my
17 mother to bring Dee James' (sic) children to his office, and
18 they were brought up there and talked.

19 Q. Well, would you have pled guilty if you had not
20 believed that you and your mother were going to be charged
21 with witness tampering?

22 A. No, sir, I would not.

23 Q. Did you understand at the time that you pled
24 guilty that you were pleading to a felony?

25 A. No, sir, I did not.

1 Q. Did you understand at the time that you pled
2 guilty that you would be required to register as a violent
3 offender as a consequence of your plea?

4 A. Nobody told me that, no, sir.

5 Q. Did you understand at the time that you entered
6 your guilty plea that by law you are not entitled to a
7 deferred imposition of sentence because of your prior felony
8 criminal record?

9 A. No.

10 Q. What did you tell the probation officer when he
11 asked you for your statement of what happened?

12 A. I told him the truth.

13 Q. Which was what?

14 A. That I was driving the car and it started on
15 fire, and I did start the fire.

16 Q. Did you tell him that you didn't, that you
17 weren't guilty?

18 A. Yes, I told him I was not guilty.

19 Q. Did you tell Jeff Michael that you weren't
20 guilty?

21 A. Yes, I did.

22 Q. If you had a choice at this time with regard to
23 whether to persist in this guilty plea and take the plea
24 offer that was given to you, which was a five-year suspended
25 sentence to the Montana State Prison, or go to trial, what

1 would your choice be?

2 A. Go to trial.

3 Q. Do you believe that the prosecution can prove
4 that you committed arson?

5 A. No.

6 Q. You heard Mr. Twito in the courtroom when you
7 pled guilty, tell the Judge what the State's theory of the
8 case was.

9 A. No, I did not. Mr. Twito wasn't there.

10 Q. Well, whoever was representing the
11 prosecution -- and I stand corrected, I do recall that it
12 wasn't Mr. Twito -- but I was just reading the transcript
13 and I noticed that somebody gave a quite lengthy proffer
14 with regard to what they believed the evidence would show.
15 Do you remember that?

16 A. Yes.

17 Q. Was that a true, in your opinion,
18 representation of what the evidence would show in this case?

19 A. No.

20 Q. Were you satisfied with Mr. Michael's services?

21 A. No.

22 MR. WATSON: All right. No further questions.

23 THE COURT: Cross-exam.

24 MR. TWITO: Thank you, Your Honor.

25 CROSS-EXAMINATION

1 BY MR. TWITO:

2 Q. I'm looking at Defendant's Exhibit A,
3 Mr. Ellison, you've looked at that document earlier during
4 your direct testimony, is your signature on that document?

5 A. Yes, it is, on the bottom there.

6 Q. And under that line, does it say defendant?

7 A. Yes, it does.

8 Q. And it's your testimony today that you did not
9 read that document?

10 A. No, I did not.

11 Q. Mr. Ellison, back on April 1st of 2008, what
12 did you do, where were you working?

13 A. For a living?

14 Q. Yes.

15 A. At that time I owned Wallpro, Incorporated.

16 Q. How many employees did you have?

17 A. It varied.

18 Q. At the time.

19 A. Maybe five or six, I think.

20 Q. And what type of business was Wallpro?

21 A. Construction.

22 Q. And did you have several projects going on at
23 that time?

24 A. On April 1st?

25 Q. Yes.

1 A. The one we had was going to, go on was
2 Sportsman's Warehouse.

3 Q. How long had you owned Wallpro?

4 A. My dad started the first company in 1968.

5 Q. How long have you been the owner in, I guess
6 the president of the company?

7 A. I'm not sure of the year. 2002 or '3 I think
8 is when we started Wallpro. We changed it from Ellison to
9 Wallpro.

10 Q. And did Wallpro enter into construction
11 contracts?

12 A. Yes, it did.

13 Q. Were a lot of those contracts written?

14 A. Yes.

15 Q. Was it your responsibility as president and
16 owner of Wallpro to review those contracts?

17 A. Most of them, yes.

18 Q. Do you put your signature on those, to those
19 contracts?

20 A. Yes.

21 Q. You can you read?

22 A. Yes.

23 Q. Did you have occasion to read those contracts?

24 A. Most of them were my own contracts that I
25 signed, yes.

1 Q. So you actually also created some contracts as
2 well?

3 A. Most of the contracts would come up on my
4 computer in n my own contracts.

5 Q. And in that process of contracting perhaps on
6 some jobs, perhaps not, did you have occasion to consult
7 with attorneys?

8 A. Most of the time I took everything to
9 attorneys.

10 Q. How many times would you say in the last three
11 or four years have you dealt with attorneys with regard to
12 contracting?

13 A. Anything that wasn't my own contract I took it
14 to a lawyer --

15 Q. Okay.

16 A. -- and they told me whether to sign it or not.

17 Q. They told you whether to sign it or not?

18 A. Yes.

19 Q. Did something that wasn't your contract, did
20 you bother to read it?

21 A. Sometimes I did, yeah.

22 Q. And sometimes you didn't?

23 A. Sometimes I didn't.

24 Q. Okay.

25 A. Most construction contracts that came from my

1 office I did read because they were generated by me.

2 Q. And those contracts perhaps varied in the value
3 of the contract from X number of dollars to a substantial
4 sum; fair enough?

5 A. Yes.

6 Q. Have you had opportunity since April 1st
7 of 2008 to look at this document?

8 A. Not until today.

9 Q. So your testimony today is you were not aware
10 of what you were signing away when you signed this document
11 in court on April 1st, 2008?

12 A. I didn't know what I was signing, I just signed
13 what Michael said.

14 Q. On April 1st, 2008, you didn't realize you were
15 charged with arson?

16 A. I know I had been.

17 Q. So you knew you had been charged with arson.
18 What do you think of that charge?

19 A. (No oral response.)

20 Q. Do you know what the severity of that charge
21 is?

22 A. The severity?

23 Q. Yeah. What do you know about arson?

24 A. (No oral response.)

25 Q. Let me rephrase. What did you know about arson

1 as of April 1st, 2008?

2 A. Not a lot. Arson is, what I understand, is if
3 you start something on fire.

4 Q. Okay. Had you had opportunity prior to
5 April 1st, 2008, to go through what we refer to in court as
6 discovery? By that, I mean police reports, and witness
7 statements?

8 A. I never saw any witness statements. I never
9 saw any paperwork prior to Michael giving it to me here in
10 court.

11 Q. Were you aware that you yourself gave a
12 statement to law enforcement in the presence of your
13 attorney, at the time, Gavin Murphy?

14 A. Yes.

15 COURT REPORTER: Your Honor, I'm sorry, I've
16 got to plug in my machine.

17 Thank you, Your Honor. Sorry, Mr. Twito.

18 Q. (By Mr. Twito) Mr. Ellison, before we went off
19 the record briefly, we were talking about your understanding
20 of arson, and I just mentioned to you about a statement that
21 you gave to law enforcement, and you remembered giving that
22 statement?

23 A. Yes.

24 Q. Do you remember when you gave that statement?

25 A. No, I don't.

1 Q. If I told you that it was in the end of the
2 summer in 2007, does that ring a bell?

3 A. That would be about close, yes.

4 Q. Do you recall how many people were present in
5 your attorney's offices when you gave that statement?

6 A. Three or four I believe, I'm not exactly sure,
7 it's been awhile.

8 Q. Okay. Do you recall the nature of the
9 questioning during that interview?

10 A. A lot of it, yes, I do.

11 Q. Okay. What did you think after you had been
12 contacted and formally interviewed in your attorney's office
13 at the time by several members of law enforcement?

14 A. That they were trying to find out what had
15 happened to that car, and I told them what happened.

16 Q. Do you recall that your attorney terminated
17 that interview?

18 A. No, I don't.

19 Q. Okay. At the time you were giving that
20 interview, did you have trouble hearing the questions that
21 were being asked?

22 A. Yes.

23 Q. Okay. How long have you had hearing trouble?

24 A. I have to count back. 10, 15 years.

25 Q. Okay. Let's go back to April 1st, 2008. You

1 recall being in front of Judge Fagg?

2 A. (No oral response.)

3 Q. Do you remember the Judge's name?

4 A. No, I don't.

5 Q. And you stated on direct examination that I
6 wasn't present in the courtroom?

7 A. (Nods head.)

8 Q. If I told you you were mistaken on that point,
9 that I in fact did give the offer of proof, would you agree
10 with me?

11 A. I don't remember you there, I remember a lady
12 being there.

13 Q. Were you under the influence of any medication
14 or drugs at the time that would perhaps would have
15 influenced your ability to recall that day?

16 A. No.

17 Q. Okay. Do you recall the Judge asking you
18 specific questions?

19 A. He was asking questions, yes.

20 Q. What sort of questions did he ask you that you
21 recall?

22 A. I don't recall all of them.

23 Q. I'm not asking you to recall all, just which
24 ones you remember. Perhaps you don't remember any.

25 A. I don't.

1 Q. Well, did you think that, the very fact that
2 you were in a courtroom such as this before a judge wearing
3 a robe with a variety of people in the courtroom, did you
4 think it was serious?

5 A. Yes.

6 Q. Okay. Did you take that day very seriously?

7 A. Yes, I did.

8 Q. Why didn't you ask the Judge to speak up if you
9 had trouble hearing him, if it was that serious?

10 A. I was doing what Mr. Michael said.

11 Q. Okay. So you were just following along, and
12 whatever Mr. Michael said, you were going to do?

13 A. He told me he had a, had made arrangements with
14 you.

15 Q. Okay.

16 A. I remember the Judge asking questions, but I
17 don't remember them.

18 Q. Okay. Could you hear those questions?

19 A. I could hear some of them, yes.

20 Q. Do you recall him asking you questions that are
21 reflected on the document that you have before you, such as
22 that you have the right to be tried by a judge or a jury,
23 and that you have the right to persist in a trial? Do you
24 remember that?

25 A. No, I don't.

1 Q. Okay. Do you remember they told you you had
2 the right to have witnesses testify on your behalf at that
3 trial?

4 A. I do remember something about some witnesses,
5 yes.

6 Q. You have the right to confront and
7 cross-examine witnesses against you?

8 A. I don't remember that one.

9 Q. Okay. You had the right not to be compelled to
10 incriminate yourself; do you recall that?

11 A. No.

12 Q. And you had the right to require that your
13 guilt be proven beyond a reasonable doubt; do you remember
14 that?

15 A. Vaguely, yes.

16 Q. Okay. How long did this, your hearing take
17 place with the Judge and with Mr. Michael?

18 A. It was very quick.

19 Q. Okay. And you testified on direct when
20 Mr. Watson asked you that you heard these facts that were
21 being brought forward by the State, by me, and you didn't
22 agree with those facts?

23 A. I heard parts of the facts, I didn't agree with
24 all of them.

25 Q. Which facts in particular didn't you agree

1 with?

2 A. That I started the fire.

3 Q. Okay. Did you understand that if you didn't
4 start the fire, that the Judge was telling you that you
5 could go to trial and that you could have those protections
6 that he was describing to you, at least the ones that you
7 heard; do you remember that?

8 A. Vaguely, yes.

9 Q. Okay. Mr. Ellison, what level of education do
10 you have?

11 A. Graduated from high school, went to college in
12 Casper and a little bit at UW.

13 Q. At the University of Wyoming?

14 A. (Nods head.)

15 Q. Now, you mentioned in direct examination some
16 threats that were conveyed to you, those threats of
17 prosecution for witness tampering; is that correct?

18 A. Correct.

19 Q. And how were those conveyed to you?

20 A. By Mr. Michaels.

21 Q. What was the threat?

22 A. That I had no choice, that if I wanted to
23 continue, I had to give him more money, which I said I
24 didn't have, and I said I can't go with this any farther,
25 that he had been on the phone to you, and that he was going

1 to throw my mom and myself in jail that day for witness
2 tampering, and I had three days to make up my mind, that he
3 said he was going -- then he had me leave for a little bit,
4 come back in, and then I came back in, and he said, well,
5 what are you going to do, and says, I'm going to have to do
6 it, I'm not going to have my mom put in jail.

7 Q. What is your understanding of what constitutes
8 witness tampering?

9 A. I don't have any idea what it means, actually.

10 Q. Well, why would you believe that your mother
11 was going to go to jail for witness tampering, or you were
12 going to go to jail for witness tampering if you didn't have
13 any idea what it was?

14 A. Michaels told us it was illegal for my mom to
15 bring those Ames kids into his office.

16 Q. And the Ames kids that you're referring to,
17 what are their names?

18 A. Rory Ames and -- no, they've got a different
19 last name. It's Rory and Dani Taylor.

20 Q. Taylor?

21 A. (Nods head.)

22 Q. Okay. Did you know Rory and Dani very well?

23 A. Yes, I did.

24 Q. Do you recall the Court asking the question
25 whether or not you had discussed the pros and cons of going

1 to trial; do you recall that?

2 A. No.

3 Q. Okay. What is an Alford plea, Mr. Ellison?

4 A. I never heard it before. Mr. Michaels
5 explained it to me that it's, you're not saying you're
6 guilty, you're just wanting the whole thing to go away.

7 Q. And what did you think you were going to get as
8 a result of pleading Alford and getting it to go away?

9 A. He told me that it was going to be moved to a
10 mischief thing and that there was going to be, whatever it's
11 called, the referred or whatever it's called, and it would
12 go away.

13 Q. Mr. Ellison, do you recall the Court discussing
14 with you criminal mischief that morning?

15 A. No.

16 Q. So you didn't hear him when the Court asked you
17 that if you were going to trial, that you could be convicted
18 of a lesser-included offense of criminal mischief, and he
19 explained that that is a misdemeanor and it has a, and he
20 explained the maximum fine and the maximum sentence; you
21 don't recall that at all?

22 A. No. I remember him saying something about
23 mischief in there, yes.

24 Q. Why didn't you ask the Court to speak up when
25 he was explaining these rights of yours?

1 A. I was doing what Michael said.

2 Q. Now, we're talking about consequences to you
3 today, that is, if this plea were to stand, that you're
4 subject to sentencing; do you understand that?

5 A. I do now, yes.

6 Q. And you're telling this Court that, one, you
7 didn't hear half of what the Court told you, that you didn't
8 ask the Court to speak up or ask the question again because
9 you were just blindly following what Mr. Michael was telling
10 you?

11 A. Would you rephrase that the, please? I'm not
12 hearing everything.

13 Q. Mr. Ellison, you're interested enough that you
14 asked me to rephrase that, so you must understand the
15 importance of this hearing today, correct?

16 A. I do now, yes.

17 Q. You're there before Judge Fagg, he is asking
18 you questions, questions that you either can't remember
19 because you didn't hear them in the first place or that you
20 can't remember them, but at the time you didn't bother
21 asking the Judge to speak up or repeat the question?

22 A. No.

23 Q. Because you were blindly following what
24 Mr. Michael was telling you what to do?

25 A. Yeah. Yes.

1 Q. Okay. Why, when the Court asked you that you
2 were satisfied with the services of Mr. Michael, did you not
3 say no, I have a problem?

4 A. I started to, and I hesitated, and I -- that
5 one I do remember very well. I didn't want my mom to go to
6 jail. He said I had to do what we were doing.

7 Q. You hesitated in the court?

8 A. Mm-hmm.

9 Q. Okay. You did ask the Court after that a
10 follow-up question about what a presentence investigative
11 report entails; do you remember that?

12 A. (No oral response.)

13 Q. Do you remember the Court telling you that you
14 could go to jail if you don't meet with the investigator to
15 complete a presentence investigative report?

16 A. I remember that, yes.

17 Q. And do you remember replying to him?

18 A. No. I don't.

19 Q. You don't remember asking the Court what does
20 that mean?

21 A. I do remember that.

22 Q. So you do remember asking the Court what that
23 meant?

24 A. Yes.

25 Q. So you were asking the Court questions that

1 day?

2 A. I think I, if I asked that question, I did,
3 yes.

4 Q. So it wasn't that you were afraid that you
5 couldn't ask the Court questions about what you were doing
6 that day, it's just that either you couldn't hear or that
7 you were blindly following Mr. Michael?

8 A. Yes.

9 Q. Mr. Ellison, are you aware of the statements
10 and documents that were attached to the brief in support of
11 your motion for withdrawal today?

12 A. Yes.

13 Q. And those were attachments given to the Court
14 and made part of the Court file, so the Court has those?

15 A. Yes.

16 Q. What information in there is pertinent that the
17 Court should know about for today's hearing?

18 A. I think all of it.

19 Q. Okay. What information in those attachments
20 wasn't available to you prior to your change of plea on
21 April 1st of 2008?

22 A. Most all of it.

23 Q. Well, can you give me a specific example? I
24 think there are several attachments, and can you give me an
25 example?

1 A. Prior to April 1st, I never saw any documents,
2 ever, Mr. Michael's never supplied me with any documents.

3 Q. Okay. Why -- Okay. So you hadn't reviewed
4 anything, you hadn't reviewed a copy of your statement, you
5 hadn't prepared for trial. Were you aware that trial was
6 set for April 1st of 2008?

7 A. Yes.

8 Q. And you never wanted to bring this to the
9 Court's attention?

10 A. I brought it to Michael's attention I'd like to
11 know what's going on, many times I did.

12 Q. And what did he tell you?

13 A. He was working on it. Sometimes he wouldn't
14 even take our calls.

15 Q. And there was, by your own admission, some
16 incident where your mother or you brought Dee Ames' children
17 into the office?

18 A. Yes.

19 Q. For what purpose?

20 A. Mr. Michaels wanted to talk to them, to
21 question them because they had information that would verify
22 stuff for me.

23 Q. Regarding what?

24 A. The arson fire. The car fire.

25 Q. Okay. What sort of information?

1 A. Rory had seen some things and Dani had seen
2 some things, and they were going to tell Michaels what, and
3 make a statement of some sort.

4 Q. Okay. Who did the police speak to in this
5 investigation, in this arson case, who did the police speak
6 to?

7 A. All I know is he spoke to Deanne Ames at my
8 office once and he spoke to me.

9 Q. Do you know of anybody else they spoke to?

10 A. No. I didn't then, I do now.

11 Q. One of the attachments to your withdrawal of
12 plea was actually a statement that was taken from Debbie
13 Harris. Does that name ring a bell?

14 A. Yes.

15 Q. Were you aware that they had spoken with Debbie
16 Harris prior to April 1st, 2008?

17 A. No.

18 Q. Were you aware that they spoke to the mechanic?

19 A. Mechanic? Oh, Den?

20 Q. Mm-hmm.

21 A. No.

22 Q. How did Deanne Ames' children, Rory and Dani,
23 how did Mr. Michael get their names?

24 A. I told them.

25 Q. How did you know to tell them about Dani and

1 Rory?

2 A. He asked me if I knew of any witnesses who
3 would help me, and I said, yeah, those two.

4 Q. Well, one of the other statements that you made
5 in your attempt to withdraw was a newspaper advertisement
6 that was placed in the Billings Gazette?

7 A. Yes.

8 Q. What was the purpose for that?

9 A. I guess Mr. Michael talked to my mom and told
10 her that we needed to find the witness, the guy that opened
11 the door that got me out of there. When I was sitting in
12 the street, somebody opened the door, I remember seeing his
13 face, and the door opened, and we wanted that witness, and
14 Mr. Michael had told my mom to put that advertisement in.

15 Q. Were you aware or not aware that Mr. Michael
16 spoke to a witness?

17 A. No.

18 Q. So he never told you or discussed with you that
19 he spoke to a witness that perhaps answered that newspaper
20 advertisement?

21 A. No.

22 Q. So anything in terms of the threats that you're
23 talking about today don't refer to that situation, they
24 refer to Dani and Rory?

25 A. Pardon?

1 Q. They refer to Dani and Rory coming into the
2 office?

3 A. And one other gentleman, yes, that I don't even
4 know who he is.

5 MR. TWITO: Okay. Your Honor, at this time I
6 have nothing further.

7 THE COURT: Do you have any redirect,
8 Mr. Watson?

9 MR. WATSON: Could I look at that, Mr. Ellison?

10 THE WITNESS: (Complies.)

11 MR. WATSON: Thank you. Your Honor, I'm
12 referring to Exhibit A.

13 REDIRECT EXAMINATION

14 BY MR. WATSON:

15 Q. Now, in response to Mr. Twito's questions, you
16 indicated that this document was filled out, handed to you
17 in the Judge's chambers, and Mr. Michael told you to sign
18 it; is that correct?

19 A. Yes, it is.

20 Q. Did he tell you to read it before you signed
21 it?

22 A. No. He said sign here. Sign here.

23 Q. Did you read it before you signed it?

24 A. No, I didn't.

25 MR. WATSON: I don't believe I have any further

1 questions.

2 THE COURT: Any recross, Mr. Twito?

3 MR. TWITO: I do not, Your Honor.

4 THE COURT: You may step down.

5 THE WITNESS: Thank you, ma'am.

6 MR. WATSON: I would like to call Marlene

7 Ellison.

8 MARLENE ANN ELLISON,

9 having been first duly sworn to state the truth, the whole
10 truth and nothing but the truth, testified as follows:

11 DIRECT EXAMINATION

12 BY MR. WATSON:

13 Q. State your name for the record.

14 A. Marlene Ann Ellison.

15 Q. Do you know Lionel Ellison?

16 A. Yes.

17 Q. How do you know Lionel?

18 A. He's my oldest child.

19 Q. Do you know Jeff Michael?

20 A. Yes, I do.

21 Q. Have you ever been to Jeff Michael's office?

22 A. Several times.

23 Q. You've heard some testimony here in the
24 courtroom to the effect that there was some suggestion that
25 you had engaged in some improper conduct. Did Jeff Michael

1 ever inform you of that?

2 A. One time, yes.

3 Q. And when did that take place?

4 A. In his office.

5 Q. And exactly what did he tell you?

6 A. He told Lionel that he was going to be --

7 Q. Were you there?

8 A. Yes, sir, I was.

9 Q. All right.

10 A. -- charged with witness tampering, and he said,
11 and your mother, too.

12 Q. Did he tell you anything about going to jail?

13 A. Yes. He said that we would go to jail.

14 Q. Did you tamper with any witnesses?

15 A. No, sir.

16 Q. How did you happen to take those children to
17 Mr. Michael's office?

18 A. Jeff Michaels wanted me to call -- or called
19 and said he wanted the kids brought in because he wanted to
20 the question them. So I got ahold of them. Dani said she
21 would come, but she didn't show up. Rory called, had said
22 that he didn't know where to go, could he meet me at the
23 shop and ride with me. So I took him in there.

24 Q. Did you suggest to those children what they
25 should tell Mr. Michael?

1 A. No, sir.

2 Q. Did you influence at all what they told
3 Mr. Michael?

4 A. No, sir.

5 Q. Did you ever encourage them to do anything
6 other than tell the truth?

7 A. No, sir. That's all I asked of either of them.

8 Q. How did it make you feel when it was suggested
9 to you that you had done something wrong that could result
10 in you going to prison?

11 A. I just kind of went blank, I just was numb
12 because I didn't know what I had done.

13 Q. At this time as you sit there right now, do you
14 in your heart believe you did anything wrong?

15 A. No, sir, I don't.

16 Q. Now, you had discussions with Lionel, I'm sure,
17 about what he should do about his arson case. At what point
18 do you think he made the decision that he just needed to go
19 along with what his lawyer was recommending?

20 A. That same day that he told us that we were
21 going to be charged, at least in my mind.

22 MR. WATSON: I don't have any other questions,
23 Judge.

24 THE COURT: Cross-exam.

25 CROSS-EXAMINATION

1 BY MR. TWITO:

2 Q. Mrs. Ellison, do you recall when it was that
3 Mr. Michael told you that you and Lionel were going to be
4 charged with witness tampering?

5 A. No. I'd have to look in my day book.

6 Q. Can you give me an estimate of how long it was
7 before the April 1st, 2008, court date?

8 A. I think it was in March.

9 Q. So several weeks before?

10 A. Mm-hmm.

11 Q. How many times did you contact Mr. Michael on
12 behalf of your son or go with your son to Mr. Michael's
13 office?

14 A. I believe every time, except maybe once.

15 Q. How many times was that?

16 A. Four or five, I think. I can't swear to how
17 many times.

18 Q. Could it be more than 10?

19 A. No, I don't believe so, but I can't tell you
20 exactly how many times.

21 Q. Okay. Are you aware of any times that Lionel
22 went to Mr. Michael's office without you?

23 A. Just once I think.

24 Q. Okay. Did Mr. Michael explain to you what
25 witness tampering was?

1 A. No, sir.

2 Q. What did you think of Mr. Michael?

3 A. He was a lawyer and I thought he knew what was
4 right what, was best.

5 Q. So when it was suggested that Lionel should
6 plead guilty, you believed that?

7 A. Yes, because I thought it was going to be for a
8 misdemeanor --

9 Q. Did Mr. Michael tell you --

10 A. -- because this is what Mr. Michaels had said.

11 Q. So Mr. Michael said he was going to plead to a
12 misdemeanor?

13 A. That's the way I understood it.

14 Q. Okay. Were you aware at the time that arson
15 was not a misdemeanor?

16 A. I was under the impression that he was in
17 contact with the county attorney's office and they were
18 trying to make a deal, and that the county attorney wanted
19 to do the misdemeanor, and there was a city cop or somebody
20 by the name of Jamie that just kept pushing and pushing, and
21 that's the extent of my knowledge.

22 Q. Did you have occasion to read any of those
23 documents perhaps by this Jamie or any other witnesses?

24 A. I never saw a paper, one. Michaels never gave
25 any of us any papers.

1 Q. Did Mr. Michael ever tell you the reason why he
2 wanted to speak with Rory and Dani?

3 A. He wanted to question them about the car fire.

4 Q. Did he seem well-informed about the car fire
5 and the issues surrounding it?

6 A. Just from what we had told him --

7 Q. Okay.

8 A. -- I presume.

9 Q. What did you tell Mr. Michael?

10 A. I didn't tell him much of anything --

11 Q. Well, you said --

12 A. -- except for when he was, when Lionel was up
13 at the hospital.

14 Q. What did you tell him?

15 A. What did I tell Mr. Michaels? Well, for one
16 thing, I said I knew my son hadn't done anything wrong.

17 Q. Okay. What else did you tell him about the
18 fire or the circumstances surrounding it?

19 A. I couldn't tell him because I wasn't there.

20 Q. Okay. So when you said we, other than what we
21 told him, how did Mr. Michael obtain information about the
22 fire?

23 A. From what I knew that was told to me in the
24 hospital, when Lionel was taken into the hospital and to the
25 emergency room.

1 Q. So you told Mr. Michael about that?

2 A. Yes.

3 Q. My question was did Mr. Michael seem informed
4 about issues surrounding the vehicle fire. And then your
5 reply was only what we told him. If you told Mr. Michael
6 only about Lionel stay at the hospital, how did he know to
7 have you contact Rory and Dani?

8 A. I suppose because we had discussed things with
9 him about Rory and Dani, and -- Oh, I know, yes, because it
10 was Dani's car.

11 Q. So you did provide information to Mr. Michael?

12 A. Yes, I presume I did.

13 Q. Did Mr. Michael ever inform Lionel of the
14 pluses and minuses of going to trial when you were present?

15 A. I don't believe so.

16 Q. Did Mr. Michael discuss issues surrounding the
17 case such as, that would affect the case such as the value
18 of Dani's car?

19 A. Yes.

20 Q. So there was that discussion?

21 A. Yes.

22 Q. And so you were there when he was discussing
23 that issue with Mr. -- or excuse me, Lionel?

24 A. Mm-hmm.

25 Q. What about the fact that the vehicle was not in

1 police possession; do you remember a conversation about
2 that?

3 A. Yes, I do.

4 Q. And Mr. Michael seemed well-informed about
5 that?

6 A. Yes.

7 Q. Okay. What about --

8 A. But I don't know if he was at the start.

9 Q. But at some point he was informed of that?

10 A. Yes.

11 Q. Do you recall when that conversation took
12 place?

13 A. I can't tell you.

14 Q. Okay. But you do recall Mr. Michael, yourself
15 and Lionel discussing those issues?

16 A. Yes.

17 Q. So obviously Mr. Michael had educated Lionel
18 and you about value being an element of arson?

19 A. Yes, he did.

20 Q. Okay. So is it fair to say --

21 A. But he threw a fit.

22 Q. What was the fit about?

23 A. Because he had Michelle get on the computer and
24 the value of the car.

25 Q. So there was a discussion about the value of

1 the vehicle?

2 A. At one time.

3 Q. All right. Was there a discussion about other
4 things such as other witnesses that were available to the
5 State or to Lionel to testify perhaps on his behalf?

6 A. I don't remember that.

7 Q. Do you recall Jeff informing Lionel when the
8 trial date was coming up?

9 A. No, sir.

10 Q. This is Defendant's Exhibit A, Mrs. Ellison,
11 have you ever seen this document?

12 A. No, sir.

13 Q. Do you recognize Lionel's signature? Just in
14 general, do you recognize your son's signature?

15 A. Yes.

16 Q. Does his signature appear on that document?

17 A. Yes.

18 Q. Okay.

19 A. No, I've never seen this before.

20 Q. Did you have time to talk with Lionel about
21 what Mr. Michael had informed him of in terms of pleading
22 guilty, meaning you weren't rushed into pleading guilty --
23 or excuse me. You said it occurred two weeks prior,
24 approximately, to this April 1st date. But did you have an
25 opportunity to speak with Lionel about the consequences of

1 what he was going to do?

2 A. I thought he was pleading to a misdemeanor.

3 Q. Okay. My question was, did you discuss that
4 with Lionel?

5 A. I don't know. I don't think so.

6 Q. You never had a conversation with him about how
7 upset you were with Mr. Michael prior to April 1st, 2008?

8 A. It wouldn't have done any good. That was
9 Lionel's lawyer. No, I probably didn't, because I thought
10 Mr. Michaels was the one that was the smart one and calling
11 the shots.

12 Q. All right. Mrs. Ellison, prior to today, have
13 you or I ever talked before?

14 A. No, sir.

15 Q. I've never threatened you with prosecution for
16 witness tampering?

17 A. I've never spoke to you ever.

18 Q. All right. Do you know who Harold Doug Beatty
19 is?

20 A. No, sir. I do know who he is now. I didn't.

21 Q. How do you know him?

22 A. Because of Michaels, and he worked for Alliant
23 Construction.

24 Q. So Mr. Michael knew of this Harold Doug Beatty,
25 so that's another fact that he was made aware of. What did

1 he say about Mr. Beatty to you?

2 A. That was the same day that he was going to do
3 the witness tampering stuff.

4 Q. And did Mr. Michael indicate to you that he had
5 spoken with Mr. Beatty?

6 A. Yes.

7 Q. And what did he tell you about Mr. Beatty?

8 A. Oh, mercy. That he was the man who had called
9 on my voice mail that said that he had helped Lionel out of
10 the car, or opened the car door.

11 Q. Okay.

12 A. And that you were willing to fly him out here
13 from Chicago as a witness.

14 Q. Okay. So you did have a discussion about that.
15 What did you think of that when Mr. Michael was telling you
16 about Mr. Beatty?

17 A. (No oral response.)

18 Q. What was your conclusion in your mind about how
19 that impacted Lionel's case?

20 A. I never really thought about it --

21 Q. Okay.

22 A. -- because I knew I was telling the truth, and
23 I didn't know anything about this man.

24 Q. All right. He never left a message on your
25 voice mail?

1 A. That's what I said, he left a message on my
2 voice mail.

3 Q. Okay.

4 A. And then I had to tell him to call -- No, I
5 didn't. That was in the paper. That was in the paper.
6 That was our telephone number and Jeff Michael's telephone
7 number.

8 Q. All right. So you never -- it was on your
9 voice mail, but you never spoke to Mr. Beatty?

10 A. No, sir.

11 Q. Do you know who Shawn Moore is?

12 A. Yes.

13 Q. Who's Shawn Moore?

14 A. He was going to merge, him and the two boys
15 were going to merge with the company.

16 Q. Him and the two boys, who are the two boys?

17 A. Royce and Rick Hunter.

18 Q. So the tampering that Mr. Michael was talking
19 to you about had to do with Mr. Beatty, correct?

20 A. No. I don't know -- No, it wasn't. He was
21 talking to me about talking to the children I think. I
22 don't know what he was meaning, I really don't.

23 Q. Okay. But you do recall him at the same time
24 as that talking about Mr. Beatty?

25 A. Yes.

1 MR. TWITO: All right. I have nothing further.

2 THE WITNESS: Why would I...

3 THE COURT: Do you have anything further?

4 MR. WATSON: No, Your Honor.

5 THE COURT: You may step down.

6 THE WITNESS: (Complies.)

7 MR. WATSON: The defense rests, Your Honor.

8 THE COURT: Mr. Twito, do you have any
9 witnesses?

10 MR. TWITO: I do, Your Honor. Before that --

11 MR. WATSON: By the way, I do have one thing,
12 Your Honor. I would like to move for the admission of my
13 exhibits to my briefs as part of the record.

14 THE COURT: Well --

15 MR. TWITO: Your Honor --

16 THE COURT: -- I'm not sure. They're already
17 in the record because they're already attached to your --

18 MR. WATSON: I just wanted to make sure, under
19 Deserly there's a provision for de novo review of
20 voluntariness of a plea, and I just wanted to make sure that
21 those, the majority of those exhibits were interviews for
22 the purposes of demonstrating to the Court that we had a
23 cognizable defense in this case and that it wasn't just a
24 frivolous motion to withdraw a guilty plea for the purpose
25 of getting back into a position to be able to renegotiate

1 the case. And so they're in the record, then I'm satisfied.

2 THE COURT: They're in the court file --

3 MR. WATSON: Thank you, Your Honor.

4 THE COURT: -- so the whole Court file would go
5 up to the Supreme Court.

6 MR. TWITO: Thank you, Your Honor. With that,
7 Judge, I want to talk with Mr. Watson. I would move for the
8 admission of the transcript of change of plea hearing.

9 MR. WATSON: I have no objection, that's also
10 an attachment to Mr. Twito's response brief.

11 MR. TWITO: It should be, but if not, I have an
12 official copy here, if that's okay?

13 MR. WATSON: I have no problem with that, I'd
14 like to refer to that. And I would like to have a chance to
15 make a brief statement, Your Honor, before we conclude.

16 THE COURT: What is the transcript exhibit?

17 MR. TWITO: For purposes of the record, the
18 clerk has marked it as State's Exhibit 1.

19 THE COURT: Okay. Exhibit 1 is admitted.

20 MR. TWITO: The State would call Detective
21 Jamie Schillinger to the stand.

22 JAMIE SCHILLINGER,
23 having been first duly sworn to state the truth, the whole
24 truth and nothing but the truth, testified as follows:

25 DIRECT EXAMINATION

1 BY MR. TWITO:

2 Q. Please state your name for the record.

3 A. Jamie Schillinger.

4 Q. What is your occupation?

5 A. I'm a detective with the Billings Police
6 Department.

7 Q. How long have you been a detective?

8 A. For almost, I'd say about five and a half
9 years.

10 Q. What is the primary area which you focus your
11 investigations upon as a detective?

12 A. Most of my cases revolve around violent crime,
13 arsons, robberies, homicides, aggravated assaults.

14 Q. Were you assigned a case that involved a Lionel
15 Ellison?

16 A. Yes, I was.

17 Q. Can you just briefly, so the Court can have a
18 reference point, when did you begin your investigation?

19 A. I was first summoned I guess by a deputy fire
20 marshal at the Billings Fire Department on June 21st
21 of 2007.

22 Q. With regard to a fire that occurred when?

23 A. In May of 2007.

24 Q. Can you just briefly, since that date, explain
25 the course of your investigation in terms of how you started

1 your investigation and how it concluded?

2 A. Well, interviewing, obviously, several people,
3 I don't know exactly how many, probably well over a dozen.
4 We got insurance reports as part of the investigation, phone
5 records, located the vehicle that was burned, reprocessed
6 that for evidence, sent the evidence to a lab in Indiana.

7 Q. Was this process documented by you?

8 A. Yes.

9 Q. Were the statements that you took recorded and
10 transcribed?

11 A. Yes.

12 Q. Were the documents preserved as part of your
13 investigative file?

14 A. Yes.

15 Q. What happens with all of those documents,
16 statements, reports, what happens to those once you're done
17 with those?

18 A. Well, what I do is I put them in a binder like
19 I carried up here. A duplicate copy of exactly everything I
20 have gets forwarded to the county attorney's office.

21 Q. Did any part of your investigation, or
22 substantial part of your investigation occur after
23 April 1st, 2008?

24 A. No.

25 Q. When is it fair to say that the great portion

1 of your investigation was complete?

2 A. I believe the last interview I did was right
3 before January 1st of 2008, or thereabouts, right around the
4 first of the year.

5 Q. As part of your investigation, did you provide
6 a documentation of your, what you testified to earlier as
7 the reprocessing of the suspected vehicle that was burned?

8 A. Yes.

9 Q. Did you provide in that documentation proof of
10 where it could be located?

11 A. Yes.

12 Q. Did you photograph that vehicle?

13 A. Yes. On the last date, or the only time I ever
14 saw the vehicle, I believe I took a hundred and seventy-two
15 pictures on that date.

16 Q. Did you, as part of your investigation, provide
17 an estimated valuation for that vehicle?

18 A. Yes.

19 Q. Detective Schillinger, were you involved in a
20 conversation between myself and Mr. Michael that related to
21 the Ellison arson?

22 A. Yes.

23 Q. Do you recall approximately the date of that
24 conversation?

25 A. I would say middle to end of March of 2008.

1 Q. What do you recall was the information that was
2 exchanged between Mr. Michael and myself with regard to the
3 Ellison matter?

4 A. Well, Mr. Michael was advised of my finding in
5 interviewing Shawn Moore and Harold Douglas Beatty and what
6 they had to tell me.

7 Q. And did you give specifics to Mr. Michael, more
8 specifics about that, I guess pending investigation given to
9 Mr. Michael?

10 A. Yes.

11 Q. Were any threats levied to Mr. Michael to be
12 conveyed to Mr. Ellison during that conversation?

13 A. No.

14 Q. Going back to your investigation, into the
15 arson specifically, did anything, in terms of you getting
16 material documented and preserved, was there any
17 irregularities in your process?

18 A. No.

19 Q. In fact, did you have occasion to have
20 conversations with Mr. Michael's investigator about certain
21 facts and statements in your investigative file?

22 A. Yes.

23 Q. And was that prior to April 1st, 2008?

24 A. Yes.

25 MR. TWITO: I have nothing further at this

1 time, Your Honor.

2 CROSS-EXAMINATION

3 BY MR. WATSON:

4 Q. Do you know Dee Ames?

5 A. I do.

6 Q. When did you first meet her?

7 A. I'd have to look at the report. I believe it
8 was July the 10th or 11th of 2007.

9 Q. Did you know her prior to your investigation of
10 this case?

11 A. No, I did not.

12 Q. Now, that automobile that was subject to this
13 alleged arson charge, was it taken into evidence?

14 A. No.

15 Q. Is it in evidence at this time?

16 A. No, it's not.

17 Q. Has any chain of custody ever been established
18 with regard to that evidence?

19 A. To the evidence, yes. To the vehicle, no.

20 Q. Well, the vehicle itself would be evidence
21 inasmuch as it was the subject of an arson claim, correct?

22 A. Well, I guess that's maybe your interpretation,
23 but it's not mine. The evidence is what I seized out of the
24 vehicle and what was documented.

25 Q. Well, did you talk to the owner of the business

1 that repaired the car?

2 A. Of Billings Automotive, yes, I did.

3 Q. What did he tell you with regard to whether the
4 gas tank was dropped?

5 A. He said it was not.

6 Q. All right. Did you talk to the mechanic who
7 worked on the car?

8 A. Denton Shillref who was the --

9 Q. I'm just asking whether you talked to him?

10 A. Well, if you would have let me finish, I would
11 have told you that. Mr. Shillref told me he was the person
12 who worked on the car.

13 Q. The owner of the business?

14 A. Correct. He's a mechanic that works there.
15 It's a small family-owned business I guess you could say.

16 Q. Now, but you yourself don't know whether the
17 tank was dropped or not because you weren't there, correct?

18 A. I do not work at Billings Automotive, I can
19 just come to an opinion, just like yourself, based off of my
20 investigation.

21 Q. Do you know what the point of ignition of the
22 fire was?

23 A. Yes.

24 Q. Have you seen the affidavit of probable cause
25 in this case?

1 A. I have not, no.

2 Q. Do you have any idea why the affidavit of
3 probable cause would not relate the point of ignition?

4 A. Are you talking the area of origin, or the heat
5 source.

6 Q. Yeah, the heat source.

7 A. Oh, no, I do not know heat source.

8 Q. Okay. Did you have an independent appraisal
9 done of this car in order to determine the value?

10 A. No.

11 Q. Was Lionel present at your meeting with Jeff
12 Michael?

13 A. No, as far as I'm aware. It was over the
14 telephone, so he could have been there.

15 Q. And as a matter of fact, the car in question
16 has been released from the custody of the police department
17 and is now in the possession of a third party not associated
18 with law enforcement; is that correct?

19 A. That is my understanding, correct.

20 Q. Now, your response to Mr. Twito's question
21 regarding whether there was any allusion to prosecution for
22 witness tampering made to Mr. Michael, did that also pertain
23 to Marlene Ellison?

24 A. Well, first to correct you, Mr. Twito asked me
25 if there were any threats. There were not any threats.

1 Now, there was an allusion to additional charges of witness
2 tampering for Mr. Ellison. Now, your perception of a threat
3 may be different than mine. I don't perceive Mr. Twito
4 telling Mr. Michael that your client is, could be subject to
5 additional charges, I don't think that's a threat, but you
6 may, I don't know. But there was no mention of Marlene
7 Ellison in that conversation that I'm aware of, that I can
8 remember, it was strictly pertaining to your client.

9 Q. All right. Well, nobody is suggesting that the
10 implication or indication by Mr. Twito that further charges
11 might be outstanding if Mr. Ellison declined to go along
12 with the plea agreement, it's not necessarily a threat. I
13 mean, that's just a fact of life.

14 A. Sure. I agree.

15 Q. So there was some discussion of the fact that
16 his office was considering further charges against Ellison
17 in the event that this arson plea was not entered?

18 A. Yes, for the defendant when you say Ellison.
19 It was not relating to the defendant's mother, but the
20 defendant.

21 Q. And what was that based on?

22 A. What was the --

23 Q. What would those -- Were you involved in the
24 investigation? Because it's my understanding that Lionel
25 Ellison never talked to this witness that it's alleged he

1 tampered with. Do you have any evidence that he did?

2 A. Well, I have two witnesses that say he did.

3 Q. And who is that?

4 A. Mr. Beatty and Mr. Moore, and then the
5 confirmation -- or the allegation that they then contacted
6 Mr. Michael and the defense investigator.

7 Q. All right. But Mr. Michael was also in on
8 placing this ad in the newspaper, correct?

9 A. I do not know.

10 Q. Did you ever see the ad?

11 A. I never did, no, so I don't know who actually
12 placed it.

13 Q. But that would be your impression based on the
14 testimony you've heard here today, that you heard Marlene
15 testify that her number and Jeff Michael's number were on
16 the phone ad, correct?

17 A. I heard her say that, yes.

18 MR. WATSON: All right. No further questions.

19 MR. TWITO: I have nothing further, Your Honor.

20 THE COURT: You may step down.

21 THE WITNESS: Thank you.

22 MR. TWITO: No further witnesses, Your Honor.

23 THE COURT: Mr. Watson, did you wish to make
24 additional argument than what's in your brief?

25 MR. WATSON: Yes, Your Honor, if I may?

1 First of all, Your Honor, I went over
2 this transcript of the plea colloquy. Mr. Ellison was
3 informed by his lawyer, and the acknowledgment reflects
4 this, that he was entitled to argue for a deferred.
5 Apparently, the prosecution and Mr. Michael were aware, or
6 it would seem to me should have been aware that Mr. Ellison
7 was not entitled to a deferred because of his record. He
8 pled under the pretense that he was entitled to a deferred.
9 He pled under the pretense that he was pleading to a
10 misdemeanor. It's obvious from that acknowledgment that he
11 didn't write any part of that. He testified that he was
12 given that and told to sign it in the Judge's chambers.
13 This is an Alford plea where he did not state facts that
14 would support an independent finding by the Court that he
15 was guilty. He was not told by anybody, including the
16 Court, that one of the consequences of his guilty plea was
17 that he would be required to register as a violent offender.
18 He was not told by the Judge that he was, that he could not
19 withdraw his guilty plea once he entered it.

20 If the Court reviews the transcript of
21 the change of plea hearing at the point which the Court
22 asked him whether he was satisfied with his lawyer,
23 Mr. Michael is on the record prompting him to say, quote,
24 "this is the part where you say yes." Lionel, as he said,
25 grudgingly said yes, and then the courtroom apparently

1 erupted into laughter because that even made it into the
2 record. He began to -- Well, first of all, the Judge didn't
3 tell him that the Judge didn't have to accept the agreement.
4 Although, I will concede that that is in the acknowledgment.
5 But I do believe, Your Honor, that in all fairness to
6 Mr. Ellison, that it's entirely believable, while not lies,
7 that he signed that agreement without reading it. By that
8 time, Your Honor, he was to the point where he felt like he
9 had to plead to whatever Mr. Michael suggested that he plead
10 to, or he and his mother were going to be in jeopardy of
11 having additional charges filed against them. He began
12 immediately to reassert his innocence. He never conceded
13 that he was, that he was guilty.

14 In fact, the acknowledgment doesn't say
15 plea of guilty, it says plea of Alford. And that's not
16 entirely correct, because you have to plead guilty in order
17 to get an Alford plea. I mean, he told the probation
18 officer, if you look at the presentence report, it reflects
19 that when he was asked to relate what he had done, he told
20 the presentence, or the probation officer that he didn't do
21 anything, and the only reason he pled guilty was to, because
22 his lawyer told him to and to avoid him and his mother being
23 prosecuted for other offenses.

24 He filed a motion to withdraw his guilty
25 plea in a timely manner. He filed a brief and exhibits

1 reflecting that he has a cognizable defense and that this is
2 not a frivolous motion or an attempt to posture and get the
3 plea withdrawn and in opens of negotiating a better plea
4 agreement. He does intend to go to trial. It will not cost
5 this Court over a day and a half of courtroom time to try
6 this case.

7 The brief filed by the prosecutor clearly
8 alludes to the fact that the prosecution indicated that
9 there was a tampering issue. The defense does not believe
10 that there is a tampering issue or that there ever was a
11 tampering issue and wonders whether the fact that
12 Mr. Michael suggested this ad be placed in the newspaper,
13 which I don't see anything the matter with it, asking for
14 witnesses, and it turned into a tampering issue, may have
15 affected Mr. Michael's incentive to get this case resolved
16 with a guilty plea, because clearly if this case had gone
17 further, and with particular regard to a tampering charge
18 being filed, he would have at least been a witness in the
19 case.

20 It's also, on page 5, the prosecutor in
21 his reply brief indicates that it wasn't, that Marlene
22 Ellison's conduct wasn't relevant. And that is not entirely
23 correct, because she indicated that Mr. Michael told her
24 that she had been threatened with prosecution, and Lionel
25 and her both were going to wind up in jail for witness

1 tampering if Lionel didn't plead guilty.

2 If you read the affidavit of probable
3 cause in this case, while it does support a finding of
4 probable cause, and I can certainly understand why the Court
5 signed an Information in this case, if you really look at
6 it, it doesn't support a logical, it doesn't set forth a
7 logical basis for successful prosecution. The car, which I
8 disagree with Officer Schillinger, I believe is a material
9 piece of evidence. I believe it's Exhibit A. It was never
10 taken into evidence. There was never a chain of custody
11 maintained. There was never an independent appraisal done
12 to establish if there was a jurisdictional amount that this
13 car was worth enough to support the jurisdictional amount
14 necessary in order to charge or prove an arson. And there
15 was no establishment of a point of ignition. There's simply
16 not a theory of prosecution.

17 Finally, Your Honor, the totality of the
18 circumstances, and I suggest to the Court that Mr. Ellison's
19 representations to this Court are candid and truthful, as
20 are his mother's, that he sincerely believed that he had to
21 plead guilty to something that he didn't do, rendering his
22 plea, in my opinion, under the law, involuntary, and I don't
23 believe this satisfies the requirement under the law that
24 Mr. Ellison be afforded the opportunity to enter into a
25 knowing, voluntary or intelligent plea, and I don't believe

1 that if this Court had known what has been adduced at this
2 hearing that the Court would have received this guilty plea,
3 not that you did, but that any court would have received
4 this guilty plea at all. And I ask that the Court allow
5 Mr. Ellison to withdraw the guilty plea and have his day in
6 the court, Your Honor, as brief as that day in court might
7 be.

8 THE COURT: Mr. Twito.

9 MR. TWITO: Briefly, Your Honor. As far as
10 argument is not contained in my brief, Judge, I think this
11 is, there's a little bit of a disadvantage here in that the
12 defense is not alleging effective assistance of counsel, and
13 then under cross-examination, they say they did whatever
14 Mr. Michael said, and if Mr. Michael never provided them the
15 discovery, didn't have informed discussions with them about
16 the state or the facts available to the State, and there's
17 definitely an ineffective claim here. So with that said, I
18 think that maybe we need to, I hate to do this, reopen this
19 for a Finley type hearing and allow Mr. Michael under the
20 protection of Gollehon to offer some explanation as to why
21 none of this was done.

22 From Mr. Detective Schillinger's
23 testimony, he stated that his investigation was essentially
24 complete by January of 2008. That meant that Mr. Michael
25 and Mr. Ellison had approximately three months to evaluate

1 the State's evidence. Further, Mr. Schillinger did give
2 some insight into how well Mr. Michael was aware of some of
3 the issues and that he was investigating this because he did
4 speak with an individual that apparently allegedly answered
5 the newspaper ad. Further, Mr. Schillinger indicated he had
6 conversations with Tom Taggart regarding facts in the case,
7 that the issues were identified, I believe it's part of the
8 Court file.

9 The omnibus form has a claim by
10 Mr. Michael that he was aware of the value of the vehicle,
11 and that that was an issue. So Mr. Michael, at least from
12 the record that we have today and what this Court has to go
13 upon, was informed as to the facts that the State could
14 present and that he could give Mr. Ellison an informed
15 decision.

16 Obviously from Mrs. Ellison's testimony
17 today, she did indicate that she met with Mr. Michael at
18 least four or five times, perhaps less than 10, but they did
19 discuss issues relating to the case, so that again
20 Mr. Michael was meeting with people, including Lionel, as
21 she stated that she went with Lionel all of those times,
22 with the exception of one time.

23 You know, again, Your Honor, the Court
24 has before it a record that shows the Court's colloquy.
25 Judge Fagg asked the necessary questions of Mr. Ellison

1 during the change of plea hearing. He did sign a waiver of
2 acknowledgment. Now, Mr. Ellison testified that he just
3 signed this without any reading it or not, but I ask you to
4 consider that less than genuine because of what is at stake
5 here. One, he's an educated man with at least several years
6 of college. He's experienced in contracting. He stated
7 that he reads contracts, especially ones that aren't his
8 own, to ensure what's inside of them before he signs them.

9 The Court was presented during this
10 Alford plea with an offer of proof that meets all the
11 elements. Mr. Ellison did not object to the State's offer
12 of proof. Mr. Ellison never asked for clarification or that
13 he couldn't hear, and he had the opportunity to do so as
14 evidenced by the transcript at the end, he does ask a
15 question, one that is pertinent, meaning he is
16 understanding, or when he can't hear what the Court is
17 saying, he knows to follow up with a question, what does
18 that mean?

19 I think that this is less than genuine.
20 I think this is an adequate colloquy which was central to
21 the question of voluntariness under the new standard, under
22 the Lone Elk and Warclub standards. This is very similar to
23 Warclub, with the exception that this Court does not have
24 before it the Finley I and Finley II hearings that they had
25 in Warclub. This is basically an ineffective of assistance

1 of counsel claim guised as a withdrawal of plea, arguing
2 facts that should be done at trial, in fact one of the issue
3 with value. Well, value as an element of arson, as an
4 element of theft, as an element of any charge where it is an
5 element is always based upon, is always given to the trier
6 of fact, that is the jury.

7 Judge Fagg, in the colloquy, reminded
8 Mr. Ellison several times that he could have this go to
9 trial. Value, which Mr. Michael was aware of, was an issue,
10 they could have gone to trial, that could have been a
11 successful defense. Mr. Michael was aware, based upon
12 Mr. Schillinger's testimony today, that the State did not
13 have in its possession the vehicle. He could have
14 challenged that, if he deemed it necessary. Mr. Michael is
15 a seasoned defense attorney. Unfortunately, he's not here
16 to defend what he did in this case.

17 Judge, with that said, based on the
18 Lone Elk-Warclub standard, if the Court looks at the Waiver
19 of Acknowledgment of Rights, which the defendant says
20 contains his signature, which contains the necessary rights
21 that he needs to waive, if the Court looks at Judge Fagg's
22 colloquy, it is adequate, it is sufficient under the
23 standard, it was voluntary, and he has not met the big cause
24 standard here today. With that said, I ask that the Court
25 deny the defendant's motion.

1 THE COURT: Well, I have to agree with
2 Mr. Twito that it was never presented to the Court in the
3 briefs by the defendant that this was in effect an
4 ineffective assistance of counsel claim, which it surely is.
5 The defendant is claiming that he never received any of the
6 investigative file, he never was allowed to discuss any of
7 the contents of that file with his counsel, he was not
8 allowed to discuss or didn't have the opportunity to discuss
9 the Acknowledgment of Waiver of Rights by Plea of Guilty, in
10 this case Alford plea, prior to signing it and participating
11 in the colloquy with Judge Fagg. I mean, all of that is an
12 ineffective assistance of counsel claim. And it's certainly
13 not appropriate for the Court to try to evaluate that claim
14 without going through the procedure that's required by the
15 Supreme Court, that being the Finley hearing process.

16 So as much as I would like to have the
17 matter submitted today, I don't believe that's possible. I
18 believe Mr. Michael is entitled to be allowed to respond to
19 the allegations that Mr. Ellison has made here today, and
20 the Court is entitled to hear his responses and determine
21 everybody's credibility and so forth and so on. And so it
22 looks like we're going to have to set another hearing and
23 ask Mr. Michael to come and testify. And certainly he's
24 entitled to a transcript of today's proceedings so he knows
25 what went on. So we'll adjourn for today, and I'll ask

1 counsel to come in and we'll talk about when we might set a
2 new hearing.

3 By the way, I have sui sponte vacated the
4 sentencing hearing for tomorrow.

5 MR. WATSON: Thank you, Your Honor.

6 MR. TWITO: Thank you, Your Honor.

7 THE COURT: So I'll see counsel in chambers.

8 (Whereupon, the Court adjourned at 2:57 p.m.)

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