

1996

# City of Orem v. Martha Ysaa Dohse : Brief of Respondent

Utah Court of Appeals

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Edward A. Berkovich; Orem City Prosecutor; Respondent's Attorney.

Randy M. Lish; McCullough, Jones and Ivins; Appellant's Attorney.

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## Recommended Citation

Brief of Respondent, *City of Orem v. Dohse*, No. 960262 (Utah Court of Appeals, 1996).

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## STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. § 78-2a-3(2)(2).

## STATEMENT OF THE ISSUE

Whether there was sufficient evidence to support the trial court's verdict.

A trial court's verdict in a criminal case is reviewed under the "clearly erroneous" standard and the verdict will only be set aside if the verdict is against the clear weight of the evidence or if the appellate court reaches a definite and firm conviction that a mistake has been made. City of Orem v. Lee, 846 P.2d 450, 452 (Utah Ct. App. 1993).

## DETERMINATIVE STATUTE

Utah Code Ann. § 76-6-602 (1990) states:

A person commits the offense of retail theft when he knowingly:

- (1) Takes possession of, conceals, carries away, transfers or causes to be carried away or transferred, any merchandise displayed, held, stored or offered for sale in a retail mercantile establishment with the intention of retaining such merchandise or with the intention of depriving the merchant permanently of the possession, use or benefit of such merchandise without paying the retail value of such merchandise . . . .

## STATEMENT OF THE CASE

### Nature of the Case

The defendant entered a grocery store, selected numerous items, and exited the store without paying for the items. The subsequently was charged with committing two offenses, (1)

retail theft, (2) public intoxication. Regarding the retail theft charge, at trial the defendant did not dispute leaving the store without paying for the items, but claimed she was forced to commit the theft. Regarding the public intoxication charge, there was not much dispute at trial. At the conclusion of trial, the court returned a guilty verdict to each charge. The intoxication charge is not part of this appeal.

#### Statement of Facts

On December 19, 1995, at approximately 8:20 p.m. the defendant was in Macey's grocery store at 880 North State Street in Orem, Utah. (Trial Transcript, p. 4) The defendant selected a video tape, unbuttoned her shirt, and placed the video tape inside her shirt. (Trial Transcript, p. 4) The defendant walked to several other aisles and selected other items, after which she entered a bathroom while carrying the selected items. (Trial Transcript, p. 5) When the defendant exited the bathrooms, the items could not be seen. (Trial Transcript, p. 6) The defendant selected a plastic bucket, placed still more items into the plastic bucket, and then walked out of the store without paying for any item. (Trial Transcript, p. 6, 7) Outside the store, the defendant was detained by three Macey's employees. (Trial Transcript, p. 7, 8) When the defendant was detained she did not at any time say she was forced to steal the items. (Trial Transcript, p. 7 - 9, 12) The defendant concedes the accuracy of these facts. (Trial Transcript, p. 15) The defendant testified she was compelled to commit the theft by a man who cut her purse strap, stole her purse, and ordered her to steal to divert store security while he, the purse thief,

made his escape. (Trial Transcript, p. 15) The defendant testified she followed the purse thief's order because the purse thief threatened to harm the defendant's family if the defendant did not follow the purse thief's order. (Trial Transcript, p. 16)

### **SUMMARY OF ARGUMENT**

Regardless how the defendant characterizes the issue on appeal, this appeal is based on the claim that the evidence at trial was insufficient to prove the defendant committed retail theft in violation of Utah Code Ann. § 76-6-602 (1990). Under the clearly erroneous standard of review, the trial court's verdict should be affirmed.

### **ARGUMENT**

#### **THE EVIDENCE PRESENTED AT TRIAL WAS SUFFICIENT TO SUPPORT THE TRIAL COURT'S VERDICT.**

A trial court's verdict in a criminal case is reviewed under the "clearly erroneous" standard and the verdict will only be set aside if the verdict is against the clear weight of the evidence or if the appellate court reaches a definite and firm conviction that a mistake has been made. City of Orem v. Lee, 846 P.2d 450, 452 (Utah Ct. App. 1993). Thus, this court should review the trial court's verdict under the "clearly erroneous" standard. The trial judge is "considered to be in the best position to assess the credibility of witnesses and to derive a sense of the proceeding as a whole, something an appellate court cannot hope to garner from a cold record." State v. Pena, 869 P.2d 932, 935 (Utah 1994).

The defendant admits performing acts sufficient to support a guilty verdict (Trial

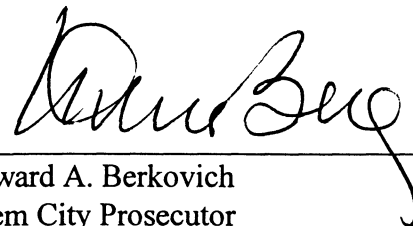


Transcript, p. 15-17), but raises the defense of compulsion. In this case, the trial court assessed the credibility of the defendant and simply accorded no weight to her testimony about the alleged aggravated robbery which allegedly compelled her conduct constituting retail theft. The trial court stated its reasons for so doing at some length. (Trial Transcript, p. 26 - 28, contained in Addenda) Simply put, the trial court found the defendant's account strained credulity and therefore accorded no weight to the defendant's account. The trial court is free to accord no weight to testimony if it chooses. Such conduct is within the trial court's discretion under the "clearly erroneous" standard. Regarding the defendant's father's testimony, his testimony at trial shows he was not present when the defendant was allegedly the victim of an aggravated robbery, and only learned of the alleged occurrence from the defendant. (Trial Transcript, p. 23) Therefore, the trial court's discounting the defendant's father's testimony does not reflect on the defendant's father's credibility.

#### CONCLUSION

Based on the foregoing, the trial court's verdict should be affirmed.

DATED and submitted this August 15, 1996.



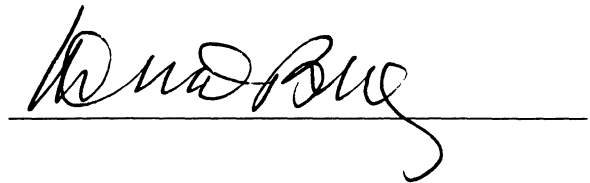
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Edward A. Berkovich  
Orem City Prosecutor

**MAILING CERTIFICATE**

On August 15, 1996, I mailed two (2) copies of this Respondent's Brief to:

Randy Lish  
Attorney for Defendant  
853 West Center Street  
Orem, Utah 84057

A handwritten signature in cursive script, appearing to read "Randy Lish", is written over a horizontal line.

## **ADDENDA**

**TRIAL COURT'S PRE-VERDICT COMMENTS**

24                   **THE COURT:**   Well, it's difficult to hear  
25   this kind of a case tried without commentary.  I

PENNY C. ABBOTT, CSR

PAGE 26

1 find it extremely difficult to rule on it just by  
2 popping off a ruling without commentary. I don't  
3 know how much I want to say but this much is  
4 certain. I'm astonished and taken aback.

5 At a time when Macey's security is locked  
6 on to the conduct of this witness in this store  
7 there is a long and lengthy sequence of her leaving  
8 the people she was with and concealing any kind of  
9 items, some of which were required to go into the  
10 restroom to conceal them.

11 May I suggest that anybody who wanted to  
12 make sure that they were apprehended for  
13 shoplifting themselves in order to cover the escape  
14 and lack of detention of somebody else would make  
15 very sure they did not enter a restroom to carry  
16 out the acts of concealment. It would of  
17 necessity be of overwhelming importance that that  
18 be conducted in front of store security.

19 Moreover, at the first time when somebody  
20 who thought themselves threatened by somebody was  
21 clearly within the care and protection of law  
22 enforcement you would expect a long and vigorous  
23 explanation of the peril and request for protection  
24 from it. Never happened. And the missing purse  
25 wasn't.

1                   City's carried its burden of proof. I  
2   return a verdict of guilty as charged on both  
3   counts.

**DOCKET ENTRY**



Orem Dept. - 4th Circuit Court

WEDNESDAY AUGUST 14, 1996

8:45 AM

Defendant

Citation:

ORP Case: 951001909 MC

DOHSE, MARTHA YSAA

City Misdemeanor

Judge: Joseph I. Dimick

1417 NORTH AMIRON #A

OREM

UT 84057

OTN #: 6928014

Charges

Bail

Violation Date: 12/19/95

1. RETAIL THEFT (SHOPLIFTING)

76-6-602

.00

Sev: MB

2. INTOXICATION

76-9-701

50.00

Sev: MC

Proceedings

12/20/95 Case filed on 12/20/95.

Mis Arraignment JUDGE: Joseph I. Dimick

KBC

TAPE: 95-561 COUNT: 5634

KBC

ATD: LISH, RANDY

PRO: CABANILLA, LAURA

KBC

Deft is present

KBC

Information was read in court

KBC

PTC scheduled for 01/03/96 at 1000 A in room 1 with JID

KBC

Chrg: 76-6-602

Plea: Not Guilty

KBC

Chrg: 76-9-701

Plea: Not Guilty

KBC

01/03/96 Hearing (PRE-TRIAL CONFERENCE): JUDGE: Joseph I. Dimick

KBC

TAPE: 004 COUNT: 1568

DJC

Deft Present

DJC

ATD: LISH, RANDY

PRO: CABANILLA, LAURA

DJC

TRL scheduled for 03/11/96 at 0100 P in room 1 with JID

DJC

01/23/96 SUBPOENA(S) FILED ON RETURN.

DJC

02/28/96 SUBPOENA(S) FILED ON RETURN

LBC

03/11/96 Trial: JUDGE: Joseph I. Dimick

LBC

TAPE: 114 COUNT: 1800

KRM

Deft Present

KRM

Deft advised of rights

KRM

Deft Waived Sentencing

KRM

PSI Ordered from ADULT PROBATION AND PAROLE

KRM

ATD: LISH, RANDY

PRO: BERKOVICH, ED

KRM

SNT scheduled for 04/23/96 at 1000 A in room 1 with JID

KRM

TRIAL HELD; DEF GUILTY TO BOTH CHARGES; MAXIMUMS IMPOSED AND

KRM

STAYED PENDING REVIEW OF SENTENCE APRIL 23, 1996 AT 10:00 A.M.

KRM

REFERRED TO AP&P FOR PRESENTENCE

KRM

04/10/96 PSI FILED.

KRM

04/11/96 NOTICE OF APPEAL FILED. SENT TO COA.

LBC

05/08/96 DOCKETING STATEMENT FILED BY ATD.

LBC

05/24/96 COURT OF APPEALS CALLED REQUESTING RECORD

LBC

06/19/96 TAPE AND TRANSCRIPT ON APPEAL FILED

KBC

06/28/96 JID:KRM; 275/3900 DEFENDANT FTA; CONTINUED FOR FURTHER

KRM

PROCEEDINGS SET FOR JULY 9, 1996 AT 10:00 A.M.

KRM

KRM

Orem Dept. - 4th Circuit Court

WEDNESDAY AUGUST 14, 1996

8:45 AM

Defendant Citation:  
DOHSE, MARTHA YSAA

ORP Case: 951001909 MC  
City Misdemeanor

07/01/96 Notice of Setting KRM  
 HRG FURPR scheduled for 07/09/96 at 1000 A in room 1 with JID KRM

07/09/96 HRG FURPR scheduled for 7/12/96 at 10:00 A in room 1 with JID RBD  
 Hearing (FURTHER PROCEEDINGS): JUDGE: Joseph I. Dimick LBC  
 TAPE: 279 COUNT: 1500 LBC  
 Deft not present LBC  
 ATD: LISH, RANDY PRO: BERKOVICH, ED LBC  
 THE APPEAL IS PERFECTED. LBC  
 DEF CAME IN TO COUNTER AND ASKED TO CONTINUE. SHE SIGNED A PTA LBC  
 FOR 7/12/96. HAVE HER SEE RANDY LISH. I DON'T BELIEVE SHE NEEDS LBC  
 TO SEE JUDGE. LBC

07/12/96 Hearing (REVIEW HEARING): JUDGE: Joseph I. Dimick KBC  
 TAPE: 96-284 COUNT: 9051 KBC  
 Deft not present KBC  
 ATD: LISH, RANDY PRO: BERKOVICH, EDWARD KBC  
 DEFENDANT NOT PRESENT NO ORDER MADE KBC

Citation Amount:

Additional Case Data

Sentence Summary

1. RETAIL THEFT	Plea: Not Guilty	Find:
2. INTOXICATION	Plea: Not Guilty	Find:

Personal Description

Sex: F	DOB: 07/10/55	State: UT	Expires:
Dr. Lic. No.: 00		Soc. Sec. No.: 158 34 3411	
Employer:		Hair: BLN	Race: H
Height: 5 06	Weight: 150	Eyes: HAZ	
Vehicle Year: 00	Make:	Model:	Style: Color:

Scheduled Hearing Summary

PRE-TRIAL CONFERENCE	on 01/03/96	1000 A in room 1 with J
TRIAL	on 03/11/96	0100 P in room 1 with J
SENTENCING	on 04/23/96	1000 A in room 1 with J
FURTHER PROCEEDINGS	on 07/09/96	1000 A in room 1 with J
FURTHER PROCEEDINGS	on 07/12/96	1000 A in room 1 with J

End of the docket report for this case.

