

1996

# The State of Utah v. Kevin R. Gordon : Brief of Appellee

Utah Court of Appeals

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Kevin R. Gordon, appellant pro se.

Joe A. Greenlief.

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## Recommended Citation

Brief of Appellee, *Utah v. Gordon*, No. 960343 (Utah Court of Appeals, 1996).

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,

Plaintiff/Appellee,

-vs-

KEVIN R. GORDON,  
Defendant/Appellant

Case No. 960152-CA

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**BRIEF OF APPELLEE**

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APPEAL FROM A FINAL JUDGMENT AND SENTENCE FOR DRIVING ON A SUSPENDED DRIVER'S LICENSE, A CLASS C MISDEMEANOR; DRIVING WITHOUT REGISTRATION, A CLASS C MISDEMEANOR; AND DRIVING WITHOUT INSURANCE, A CLASS B MISDEMEANOR, ENTERED IN THE THIRD JUDICIAL DISTRICT COURT, DIVISION II, IN AND FOR SALT LAKE COUNTY, WEST VALLEY DEPARTMENT, STATE OF UTAH, HONORABLE CARLOS A. ESQUEDA PRESIDING.

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**JURISDICTION**

Utah Code Section 78-2a-3(2)(e) provides that this Court has jurisdiction over "appeals from a court of record in criminal cases." Appellant was convicted of a class A misdemeanor in a court of record and thus this Court has jurisdiction to hear this case.

**ISSUES AND STANDARDS OF REVIEW**

**ISSUE # 1**

Did the trial court correctly deny Appellant's Motion to Dismiss the case and hold the State was not required to provide an Information at Appellant's arraignment?

"The propriety of a trial court's decision to grant or deny a motion to dismiss is a question of law that we review for correctness." *Tiede v. State*, 915 P.2d 500, 502 (Utah 1996).

**ISSUE # 2**

May Appellant properly raise 31 issues on appeal--not raised at trial--without a showing of exceptional circumstances?

A party may not raise an issue for the first time on appeal without a showing of exceptional circumstances that effectively made it impossible for such an issue to be raised at trial.

*State V. Wodskow*, 896 P.2d 29 (Ct. App. 1995)(citing *State v. Cook* 881 P.2d 913, 914 (Utah 1994).

## STATUTES

Utah Code Annotated Section 78-2a-3(2)(e) (1997).

(2) The Court of Appeals had appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(e) appeals from a court of record in criminal cases, except those involving a conviction of a first degree or capital felony

Utah Code of Criminal Procedure Section 77-7-21(1997)

(1)(a) A copy of the citation issued under Section 77-7-18 that is filed with the magistrate may be used in lieu of an information to which the person cited may plead guilty or no contest and be sentenced or on which bail may be forfeited.

....  
(2) An information shall be filed and proceedings held in accordance with the Rules of Criminal Procedure and all other applicable provisions of this code if the person cited:

....  
(b) pleads not guilty to the offense charged.

## STATEMENT OF FACTS

On February 9th, 1996, an adult probations and parole officer pulled over Appellant on southbound I-215 at about 3500 south, because Appellant was driving recklessly. (T. of trial, p 24-23). The adult probations and parole officer radioed for assistance, and Utah Highway Patrol Trooper Glen Hill (the "Trooper") arrived. (T. of trial, p. 24). The Trooper took over the investigation and discovered Appellant was driving on a suspended license and expired registration, and without insurance. (T. of trial, p. 28-31). The Trooper then cited Appellant for these three offenses. (T. of trial, p. 28-31). Appellant signed the citation, promising to appear for his arraignment at a later date. (Index of record, p. 1).

On February 29, 1996, Appellant appeared at his arraignment and entered a plea of not guilty. (T. of arraignment, p.4, ll. 4-5). On Friday, March 15, 1996, Appellant appeared for a pretrial conference, at which a date was set for trial. (T. of pretrial conference, p. 8). On Friday, March 25, 1996, an unsigned copy of the information was filed with the Third Circuit Court, West Valley Department.

On Friday, April 5, 1996, Appellant's trial began. Before the first witness was sworn, Appellant moved the court to dismiss the charges on the ground that an Information was not filed before he came to arraignment. (T. of trial, p. 15, ll. 4 &5, p. 17, ll. 24&25). Appellant stated in oral argument on his motion that the information "was not filed before I came to arraignment. That's my point." (T. of trial, p. 15, ll. 4-5). The court then sua sponte observed that the Information had not yet been sworn before a judge. (T. of trial, p. 16, ll 9-10). The Trooper then came forward, read the Information, swore to Judge Esqueda that it was correct to the best of his knowledge, and signed it. (T. of trial, p. 16-17). Immediately thereafter, Deputy District

Attorney for Salt Lake County Joe Greenlief also swore to and signed the Information before Judge Esqueda. (T. of trial, p 17).

With everything then in order, Judge Esqueda denied Appellant's Motion to Dismiss, noting that the arraigning judge was legally entitled to proceed on the citation. (T. of trial p. 18, ll. 16-18). Appellant complained that "to me it's very, very plain that I can't even plead until the filing of the Information, yet, you're telling me I can." (T. of trial, p. 21, ll. 4 &5). The court confirmed that Appellant could indeed plead on the citation, and instructed the State to call its first witness. (T. of trial, p. 21, ll. 6-7, p. 22, ll 2-7).

The Trooper came forward, testified as to the events occurring on the date Appellant was cited, and the court found Appellant guilty of all three counts. (T. of trial pp. 22-34). On April 26th, 1996, Defendant was sentenced to a \$310 fine, required to obtain a driver's license, registration, and insurance, and given twelve months' probation. (Index of record, p. 8) On May 17, 1996, Appellant filed a notice of appeal, which is now before this Court.

#### **SUMMARY OF ARGUMENT**

This Court should affirm the trial court's denial of Appellant's Motion to Dismiss. The trial court properly ruled that the State was not required to file an Information before Appellant's arraignment. Appellant apparently misinterprets the statute explicitly requiring him to plead to the citation. Because the Utah Code permits an arraigning judge to take a plea to charges listed solely in the citation, no Information was required at that stage and Appellant's rights were never trampled.

Furthermore, this Court should decline to address all but one of Appellant's thirty-two issues. The only issue Defendant preserved for appeal was his Motion to Dismiss, which was

based on the argument that he was entitled to an information at his arraignment. That issue is set forth in I(6)(b) of Appellant's brief, page 11. Every other issue in Appellant's brief either restates the issue contained in I(6)(b) or is an issue raised for the first time on appeal. Appellant has not met his burden of showing exceptional circumstances that prevented him from raising these issues at trial. Therefore, this Court should not address any issue except that contained in I(6)(b) of Appellant's brief.

## **ARGUMENT**

### **I. THE TRIAL COURT CORRECTLY DENIED APPELLANT'S MOTION TO DISMISS**

This Court should affirm the trial court's denial of Appellant's Motion to Dismiss because Appellant was not entitled to an information at his arraignment. The Utah Code of Criminal Procedure states:

A copy of the citation issued under Section 77-7-18 that is filed with the magistrate may be used in lieu of an information to which the person cited may plead guilty or no contest and be sentenced or on which bail may be forfeited

Utah Code of Criminal Procedure § 77-7-21(1)(a) (1997)(Proceeding on Citation).

This provision clearly states that a cited person may plead guilty or no contest to the charges listed on the citation. If the person does so, the State is not required to file an information.

However, the scenario changes if the person elects to plead not guilty to the charges listed in the citation:

An information shall be filed and proceedings held in accordance with the Rules of Criminal Procedure and all other applicable provisions of this code if the person cited:

(b) pleads not guilty to the offense charged.

Utah Code of Criminal Procedure § 77-7-21(2)(b)(1997).

The foregoing provision requires the State to file an information *after* the cited person pleads not guilty to the offense listed in the citation. Appellant plead not guilty at his arraignment to the charges listed in his citation.<sup>1</sup> At that point, the State was required to file an Information. The State did file an Information on March 25, 1996, two weeks before Appellant's trial.<sup>2</sup> Thus, the State met its procedural burden and filed an Information at the correct time.

Notwithstanding the clear language of the Utah Code of Criminal Procedure, Appellant insists that he was entitled to an Information before he plead. But this contention is logically impossible. As the Code makes clear, the necessity of an Information hinged on Appellant's plea: if he plead not guilty, no Information was required; if he plead guilty, an Information was required. But until such a plea is entered, neither the State nor the Court can know whether an Information will be required. Thus, it makes no sense to insist that an Information is required *before* the plea.

In sum, the trial court properly denied Appellant's Motion to Dismiss. Appellant was cited for three motor vehicle misdemeanors and plead not guilty to those misdemeanors. As required, the State then filed an Information two full weeks before trial. At no point were Appellant's rights violated, and this Court should accordingly affirm the trial court's ruling.

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<sup>1</sup> Appellant would have this Court believe the arraigning judge entered a not guilty plea for him because he objected to pleading, and would not do so at his arraignment because an information had not been filed. But Appellant did not object, and did plead, as the transcript of that hearing reveals:

THE COURT: . . . This is the arraignment. The purpose of the arraignment is for you to enter a plea of either guilty or not guilty.

MR. GORDON: Okay, I'll enter not guilty and we'll work it out later then.

THE COURT: Sounds like a good idea to me. I'll enter a not guilty plea for you on all three charges. Come over, we'll give you a pretrial date.  
(T. Of arraignment, p. 5, ll 1-8).

<sup>2</sup> While it is true that the information was not sworn and signed until the day of trial, the information "served its primary purpose, which was to put the defendant on notice of the charges leveled against him." *State v. Leary*, 646 P.2d 727, 731 (Utah 1982).

## II. THIS COURT SHOULD DECLINE TO ADDRESS APPELLANT'S REMAINING 31 ISSUES

Appellant improperly raises a plethora of new issues on appeal without showing exceptional circumstances requiring this Court to address these issues. A party may not raise an issue for the first time on appeal without a showing of exceptional circumstances that effectively made it impossible for such an issue to be raised at trial. *State V. Wodskow*, 896 P.2d 29 (Ct. App. 1995)(citing *State v. Cook* 881 P.2d 913, 914 (Utah 1994)).

Appellant asks this Court to address a variety of issues ranging from "Is a citation an information?" to "Is a first initial a name?" But none of these issues were preserved for appeal. Appellant has made no showing that he ever brought such issues before the trial court. Indeed, by Appellant's own admission at trial he had only one argument: an Information "was not filed before I came to arraignment. That's my point." (T. of trial, p. 15, ll. 4-5).

Furthermore, there are no "exceptional circumstances" requiring this Court to address any of Appellant's extraneous issues. Appellant has pointed to nothing in the record that indicates he was denied due process or otherwise prevented from raising any issue he chose. In fact, the trial court was exceptionally open to Appellant's position, as is evidenced by the fact that nearly half of the trial transcript is devoted to arguments on Appellant's Motion. The trial court asked Appellant six times before the trial if he had any further concerns or questions, or if he was ready to proceed. In light of the trial court's open attitude, Appellant cannot now argue there were exceptional circumstances preventing him from addressing the issues he now raises for the first time on appeal.

In sum, this Court should not address any issue raised by Appellant except that contained in I(6)(b) of Appellant's brief. That is the sole issue raised by Appellant at court. It was the subject of his arguments in support of his Motion to Dismiss. Every other issue is newly raised by Appellant and because there were no exceptional circumstances at trial, this Court should decline to address these issues.

## CONCLUSION

This Court should affirm the trial Court's denial of Appellant's Motion to Dismiss. The Utah Code of Criminal Procedure does not require the State to file an Information until *after* Appellant pleads not guilty to the charges in the citation. The State did file an information after Appellant plead not guilty, thereby meeting its procedural burden and giving Appellant notice of the charges against him. Furthermore, this Court should decline to analyze any of Appellant's remaining issues. Those issues were not properly preserved for appeal and no exceptional circumstances exist to warrant review.

RESPECTFULLY SUBMITTED this \_\_\_\_ day of October, 1997.

E. NEAL GUNNARSON  
District Attorney

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JOE A. GREENLIEF  
Deputy District Attorney

**CERTIFICATE OF MAILING**

I hereby certify that a true and correct copy of the foregoing Memorandum In Opposition To Defendant's Motion To Suppress was mailed to KEVIN R. GORDON, Pro Se, at 494 E. 11000 S., Sandy, Utah 84070, on the \_\_\_\_ day of October, 1997.

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