2007

# State of Utah vs. John Vonderhaar Haltom : Reply Brief

Utah Court of Appeals


Christine F. Soltis; Assitnat attorney general; attorney for appellee.
W. Andrew McCullough; attorney for appellant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

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| STATE OF UTAH, | : | |
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| Plaintiff/Appellee, | : | |
| | : | |
| vs. | : | Case No. 20070498-CA |
| | : | |
| JOHN VONDERHAAR HALTOM, | : | |
| | : | |
| Defendant/Appellant. | : | |

APPEAL FROM A JUDGMENT OF THE THIRD DISTRICT COURT OF SALT LAKE COUNTY, UTAH, HON. RANDALL N. SKANCHY

# REPLY BRIEF OF APPELLANT JOHN VONDERHAAR HALTOM

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# TABLE OF AUTHORITIES CITED

## CASE AUTHORITY



## STATUTES CITED

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

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| | : | |
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## SUMMARY OF ARGUMENT

The trial judge who, without any knowledge of the case at hand, refused to consider the legal reasons why Defendant's Motion to Reduce should be granted, is entitled to no particular deference here. The change in the law eliminating the crime of which Defendant was convicted is an important factor in the consideration as to whether the charge should be reduced to a misdemeanor. Also, however, the fact that Defendant completed probation in an exemplary manner, that the crime is more than six years old, and that it is a crime only involving simple negligence, militate towards granting the motion.

## POINT I

## THE SUCCESSOR DISTRICT COURT JUDGE WHO REFUSED TO GRANT THE MOTION TO REDUCE IS ENTITLED TO NO DEFERENCE IN THIS MATTER.

The State here responds to Defendant's first point on Appeal, in a two paragraph footnote, pointing out only that "great deference" is due to a trial judge in the use of discretion, under State v. Graham, 2006 UT 43, 143 P.3d 268 (Utah 2006). Its reference to that case is to another footnote which points out that the standard of review referred to in State v. Virgin, 2006 UT 29, 137 P.3d 787 (Utah 2006), does not apply to questions of statutory interpretation, which are questions of law. That is not news to anyone. It does go on to say that the standard of "some deference" is for use in questions of mixed fact and law. Defendant responds that the decision of the trial court in this matter surely comes within that category. Defendant moved to reduce the severity of his sentence based on a positive change in the law which removed his conduct from that prohibited by statute. While it is true that sentences which are final before the legal change are not vacated as a matter of law, the law change certainly must be considered in response to a motion under Utah Code Ann. § 76-3-402. Clearly that makes it a mixed question of fact and law. The State did not respond in any meaningful way to the fact that the trial Judge was not, in this case,

in any better position to make a determination than is this Court. He had not been involved in trying the case, nor was he in any way in a superior position to use his powers of perception or observation. Indeed, the footnote citation to the unpublished case of State v. Albiston, 2005 UT App 425 (Utah App. Oct. 6, 2005)[1] is inapposite. The Court there also reviewed the refusal of the trial court to grant a reduction under Utah Code Ann. § 76-3-402, and said:

> Albiston has failed to make any showing that the district court abused its discretion when it denied the motion to reduce her sentence. For instance, there is no showing that the district court failed to consider any legally relevant factors. To the contrary, the record is clear that the district court specifically reviewed all materials on file, including all materials presented by Albiston, and specifically considered each or her arguments for reduction. Indeed, Albiston concedes that the district court considered all relevant factors prior to sentencing.

Defendant here concedes no such thing, and specifically contends that the refusal of the trial Court to consider relevant factors has led to reversible error.[2]

## POINT II

## DEFENDANT IS ENTITLED TO THE BENEFIT OF A CHANGE IN THE LAW

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[1] Cited without providing a copy or giving the date of decision.

[2] It appears that Ms. Albiston pled guilty, which certainly limited the trial court's intimate knowledge of the case; but it is likely that the trial Judge had at least some knowledge of the case, through various proceedings, in excess of that had by this Court on review.

SINCE HIS CONVICTION WHICH HAS CHANGED THE ELEMENTS OF THE CRIME; AND UNDER CURRENT LAW, NO CRIME WAS COMMITTED.

The State, in its main point of opposition in this Appeal, claims that the change in Utah Code Ann. § 76-10-1201 "created a possible ambiguity" in the law. It did no such thing – it simply and clearly negated the statutory scheme under which Defendant was convicted. The citation to Li v. Zhang, 2005 UT App 246, 120 P.3d 30 (Utah App. 2005) for the proposition that the more reasonable interpretation should be adopted, when a statute is capable of being interpreted two ways, is disingenuous at best. An argument can be made for the proposition that the legislative sponsor did not intend to do what he accomplished with this statutory change; but it cannot be doubted that it was, in fact accomplished. A bill has been prefiled for the 2008 legislative general session, to "fix the mistake". But, mistaken or not, it is done until it is undone. See again Mini Spas v. State, 657 P.2d 1348 (Utah 1983), where the Supreme Court held that it did not have the power to rewrite a statute, even if the mistake was obvious. The State ends its brief with the statement that: "More likely, the legislature made a grammatical mistake." Perhaps so, but the law is what it is.

None of this jousting over the meaning and effect of the statutory change,

however, should obscure that fact that the crime of which Defendant was convicted was one of simple negligence, committed after Defendant's most trusted employee had not done his job. Defendant has had no further legal troubles for over six years since this incident, which occurred in August, 2000. Defendant completed probation in an exemplary manner, but is still unable to exercise his franchise in the State of Nebraska where he now resides. Defendant does not say that the statutory change compels the result sought. It merely tips the scales in favor of a result which is equitable under the circumstances. Deferring, under these circumstances, to a trial Judge who has no background in the case, is an abrogation of responsibility.

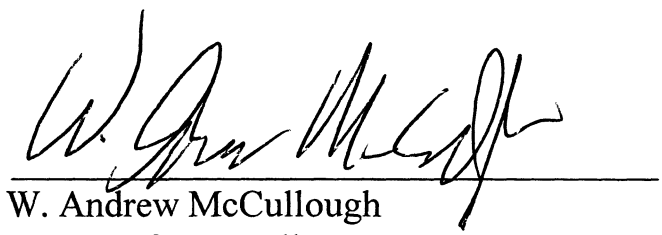
## CONCLUSION

This Court should determine that the degree of discretion to be exercised by the trial Court in this situation is diminished; and that, considering all the equities, Defendant should be granted the reduction to a Class A misdemeanor that he seeks. It is the right thing to do; and it is in accord with the legislative changes which, at

least for the present, prevent any further prosecutions for this crime.

DATED this 7 day of January, 2008

W. ANDREW MCCULLOUGH. L.L.C.



W. Andrew McCullough
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of January, 2008 I did mail two true and correct copies of the foregoing Brief of Appellant, postage prepaid, to Christine Soltis, Assistant Utah Attorney General, PO Box 140854, Salt Lake City, UT 84114.