

1996

## Utah v. Friis : Reply Brief

Utah Court of Appeals

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960445-CA

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, :  
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Plaintiff and Appellee, :  
 : Case No. 960445-CA  
vs. :  
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ROBERT FRIIS, : Priority No. 2  
 :  
Defendant and Appellant. :  
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REPLY BRIEF OF APPELLANT

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Appeal from the Final Judgment and Jury Verdict  
of the Fifth Judicial District Court, County of Iron  
State of Utah, by the Honorable J. Philip Eves

---

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FEB - 4 1998

COURT OF APPEALS

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Defendant and Appellant.	:	

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Comes now the appellant, Robert Friis, by and through counsel, D. Bruce Oliver, and, pursuant to the Rule 24 (c), Utah Rules of Appellate Procedure, hereby replies to the appellee's new matters set forth as follows:

POINTS I-IV.  
FAILURE TO PROVE AN ELEMENT OF THE CRIME IS PLAIN ERROR.

Counsel for Appellee attempts to discredit appellant's position that it was error for the judge in this matter to assist the State in the presentation of it's case. The appellee, in

it's Brief, states that the judge's remarks were not testimony because they were unsworn. This begs the point that the State had the burden to prove beyond a reasonable doubt each and every element of the offense. (See, Utah Code Ann. § 76-1-501 (1953, as amended); addendum A.) The trial judge herein relieved the state of proving the element of the offense as it pertained to the competency of the California Court. The only person who provided information on the structure and jurisdiction of the California Court system was the trial judge. He had practiced in California, he knew, or so he told counsel, how the California Court's were structured. (R. at 894) (Addendum B). When the trial judge took judicial notice of the judicial system in the State of California he lost his neutrality and became an advocate for the State's case. In United States v. Joseph, 781 F.2d 549 (6th Cir. 1986) the court ruled that it was reversible error for a judge in a bench trial to rely upon previously excluded evidence to convict the defendant. This case has two applications to this case.

The trial judge herein had previously stated that the burden to prove jurisdiction was upon the State. Judge Eves stated:

It leaves open for adjudication during these proceedings the question of whether a court of competent jurisdiction somewhere has issued a decree or Order which the defendant has violated in this State. And that's the only thing the State's required to prove as far as I can see from the statute.

(R. at 784; addendum B).

Judge Eves further stated that he was going to let the jury decide the question as to the competency of the court issuing the order or decree. (See R. at 797, generally; addendum C). He specifically stated that "But I don't think I can [make the determination that the California Court is a court of competent jurisdiction] since it's an element of the offense."  
(R. at 797).

Judge Eves went on further to advise Mr. Burns, the prosecuting attorney, that the method of proving the competency jurisdiction of the court issuing the order which was the subject matter of this case was:

[T]o file a pretrial motion in limine and ask the court to adjudicate whether the California Superior Court is a court of competent jurisdiction.

(R. at 797; addendum C).

Then contrary to his prior determination, Judge Eves went on to state:

As a matter of fact, I'm well aware of the California system having been licensed in the state of California to practice law, having practiced there for five years before I moved to, to Utah in the, both the municipal courts and the superior courts of that state. And I am well aware of the fact that the California Superior Court is analogous to the Utah District Court and that the court is the court that is charged with handling domestic matters, divorce matters.

(R. at 893-94; addendum D).

It was this intimate knowledge of California courts which then enabled him to take judicial notice of the competency of the



court which issued the order in this case, in violation of the rules of evidence.

Utah Rules of Evidence Rule 605 precludes such judicial notice, providing:

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

Utah R. Evid. 605. Judge Eves testimony and personal knowledge was extremely critical to the presentation of the prosecutions case and is plain error reviewable by this court. His testimony relieved the state of the burden of proving one of the elements of the offense. The judge himself previously said he could not do so.

Absent the judge's assistance in proving this element of the offense there would have been no conviction. This court should overturn Mr. Friis' conviction. Like the case in Joseph, supra., the judge indicated that he could not assist the prosecution in this case. The judge went on to state that he didn't think that the admission of the Decree would prove that the Decree was issued by a court of competent jurisdiction. He then proceeds to rescue a floundering prosecution by taking judicial notice of an element of the offense alleged based upon his own experience in the practice of law in California.

POINT VI.  
FAILURES OF THE COURT TO DETERMINE APPROPRIATENESS OF MISTRIAL  
CAUSED DOUBLE JEOPARDY.

In State v. Castle, \_\_\_\_\_ P. 2d \_\_\_\_\_, 333 Utah Adv. Rep. 26 (January 2, 1998), the Utah Court of Appeals clarifies as to when a defendant is entitled to have jeopardy attach for purposes of double jeopardy when the state moves for a mistrial during trial. In Castle, this court stated:

When ordering a mistrial, the trial court must support its ruling by showing that legal necessity required the mistrial in the interests of justice. See Ambrose, 598 P. 2d at 358. "The doctrine of legal necessity means that absent the consent of the defendant to a mistrial, the court must refrain from prematurely discharging the jury unless it determines, after careful inquiry that discharging the jury is the only reasonable alternative to insure justice under the circumstances." State v. Pearson, 818 P.2d 581, 584 (Ut. Ct. App 1991) citing Ambrose, 598 P. 2d at 358).

Id. at 28.

In this case there was no inquiry as to possible bias. The defense did not do anything to provoke the conduct of the juror, as a matter of fact defense counsel did all that he could to avoid the contact. Further, defense counsel reported the contact with the juror immediately to both the prosecution and the court. There was no legal necessity created or present which would have prevented the continuation of the trial with the jury as it was then constituted. Defendant had that right. Defendant was deprived of that right by the ruling of the judge on the motion from the State. It was not impossible to proceed with the

trial. The State's Motion for mistrial was not joined by defendant, he resisted such a motion.

Utah Code Ann. § 76-1-403 (1953, as amended) provides the guidelines and the law as it applies to this issue in this case. This statute provides:

76-1-403. Former prosecution barring subsequent prosecution for offense out of same episode.

(1) If a defendant has been prosecuted for one or more offenses arising out of a single criminal episode, a subsequent prosecution for the same or a different offense arising out of the same criminal episode is barred if:

(a) The subsequent prosecution is for an offense that was or should have been tried under Subsection 76-1-402(2) in the former prosecution; and

(b) The former prosecution:

(i) resulted in acquittal; or

(ii) resulted in conviction; or

(iii) was improperly terminated; or

(iv) was terminated by a final order or judgment for the defendant that has not been reversed, set aside, or vacated and that necessarily required a determination inconsistent with a fact that must be established to secure conviction in the subsequent prosecution.

(2) There is an acquittal if the prosecution resulted in a finding of not guilty by the trier of facts or in a determination that there was insufficient evidence to warrant conviction. A finding of guilty of a lesser included offense is an acquittal of the greater offense even though the conviction for the lesser included offense is subsequently reversed, set aside, or vacated.

(3) There is a conviction if the prosecution resulted in a judgment of guilt that has not been reversed, set aside, or vacated; a verdict of guilty that has not been reversed, set aside, or vacated and that is capable of supporting a judgment; or a plea of guilty accepted by the court.

(4) There is an improper termination of prosecution if the termination takes place before the verdict, is for reasons not amounting to an acquittal, and takes place after a jury has been impanelled and sworn to try the defendant, or, if the jury trial is waived, after the first witness is

sworn. However, termination of prosecution is not improper if:

- (a) The defendant consents to the termination; or
- (b) The defendant waives his right to object to the termination;
- (c) The court finds and states for the record that the termination is necessary because:
  - (i) It is physically impossible to proceed with the trial in conformity with the law; or
  - (ii) There is a legal defect in the proceeding not attributable to the state that would make any judgment entered upon a verdict reversible as a matter of law; or
  - (iii) Prejudicial conduct in or out of the courtroom not attributable to the state makes it impossible to proceed with the trial without injustice to the defendant or the state; or
  - (iv) The jury is unable to agree upon a verdict; or
  - (v) False statements of a juror on voir dire prevent a fair trial.

Utah Code Ann. § 76-1-403 (1997).

The appropriate sub-section which is controlling herein is 76-1-403 (4) (c) (iii). This sub-section provides that in order to terminate a prosecution it must be impossible to proceed with the trial without injustice to the defendant or the state. There was no inquiry about any prejudice or bias and there was no effort to determine whether or not it was impossible to continue without injustice to either the defendant, or the state.

#### CONCLUSION

Based upon the foregoing and the issues raised in his initial brief, the appellant hereby requests this Honorable Court to reverse the conviction.

RESPECTFULLY SUBMITTED this 4th day of  
February, 1998.

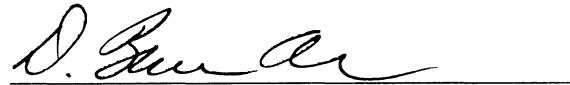


D. BRUCE OLIVER  
Attorney for Defendant and Appellant

CERTIFICATE OF MAILING

I, D. Bruce Oliver, hereby certify that on this 4th  
day of February, 1998, I served a copy of the foregoing **REPLY**  
**BRIEF OF APPELLANT** upon the counsel for the Appellee in this  
matter, by mailing it to him by first class mail with sufficient  
postage prepaid to the following address: J. Frederick Voros,  
Jr., Assistant Attorney General, Jan Graham, Utah Attorney  
General, Heber Wells Building, 160 East 300 South, 6th Floor,  
P.O. Box 140854, Salt Lake City, Utah 84114-0854.

Dated this 4th day of February, 1998.



## ADDENDUM A

ment entered upon a verdict reversible as a matter of law; or

(iii) Prejudicial conduct in or out of the courtroom not attributable to the state makes it impossible to proceed with the trial without injustice to the defendant or the state; or

(iv) The jury is unable to agree upon a verdict; or

(v) False statements of a juror on voir dire prevent a fair trial. 1974

**76-1-404. Concurrent jurisdiction — Prosecution in other jurisdiction barring prosecution in state.**

If a defendant's conduct establishes the commission of one or more offenses within the concurrent jurisdiction of this state and of another jurisdiction, federal or state, the prosecution in the other jurisdiction is a bar to a subsequent prosecution in this state if (1) the former prosecution resulted in an acquittal, conviction, or termination of prosecution, as those terms are defined in Section 76-1-403, and (2) the subsequent prosecution is for the same offense or offenses. 1973

**76-1-405. Subsequent prosecution not barred — Circumstances.**

A subsequent prosecution for an offense shall not be barred under the following circumstances:

(1) The former prosecution was procured by the defendant without the knowledge of the prosecuting attorney bringing the subsequent prosecution and with intent to avoid the sentence that might otherwise be imposed; or

(2) The former prosecution resulted in a judgment of guilt held invalid in a subsequent proceeding on writ of habeas corpus, coram nobis, or similar collateral attack. 1973

## PART 5

### BURDEN OF PROOF

**76-1-501. Presumption of innocence — "Element of the offense" defined.**

(1) A defendant in a criminal proceeding is presumed to be innocent until each element of the offense charged against him is proved beyond a reasonable doubt. In absence of such proof, the defendant shall be acquitted.

(2) As used in this part the words "element of the offense" mean:

(a) The conduct, attendant circumstances, or results of conduct proscribed, prohibited, or forbidden in the definition of the offense;

(b) The culpable mental state required.

(3) The existence of jurisdiction and venue are not elements of the offense but shall be established by a preponderance of the evidence. 1973

**76-1-502. Negating defense by allegation or proof — When not required.**

Section 76-1-501 does not require negating a defense:

(1) By allegation in an information, indictment, or other charge; or

(2) By proof, unless:

(a) The defense is in issue in the case as a result of evidence presented at trial, either by the prosecution or the defense; or

(b) The defense is an affirmative defense, and the defendant has presented evidence of such affirmative defense. 1973

**76-1-503. Presumption of fact.**

An evidentiary presumption established by this code or other penal statute has the following consequences:

(1) When evidence of facts which support the presumption exist, the issue of the existence of the presumed fact must be submitted to the jury unless the court is satisfied that the evidence as a whole clearly negates the presumed fact;

(2) In submitting the issue of the existence of a presumed fact to the jury, the court shall charge that while the presumed fact must on all evidence be proved beyond a reasonable doubt, the law regards the facts giving rise to the presumption as evidence of the presumed fact. 1973

**76-1-504. Affirmative defense presented by defendant.**

Evidence of an affirmative defense as defined by this code or other statutes shall be presented by the defendant. 1973

## PART 6

### DEFINITIONS

**76-1-601. Definitions.**

Unless otherwise provided, the following terms apply to this title:

(1) "Act" means a voluntary bodily movement and includes speech.

(2) "Actor" means a person whose criminal responsibility is in issue in a criminal action.

(3) "Bodily injury" means physical pain, illness, or any impairment of physical condition.

(4) "Conduct" means an act or omission.

(5) "Dangerous weapon" means:

(a) any item capable of causing death or serious bodily injury; or

(b) a facsimile or representation of the item; and:

(i) the actor's use or apparent intended use of the item leads the victim to reasonably believe the item is likely to cause death or serious bodily injury; or

(ii) the actor represents to the victim verbally or in any other manner that he is in control of such an item.

(6) "Offense" means a violation of any penal statute of this state.

(7) "Omission" means a failure to act when there is a legal duty to act and the actor is capable of acting.

(8) "Person" means an individual, public or private corporation, government, partnership, or unincorporated association.

(9) "Possess" means to have physical possession of or to exercise dominion or control over tangible property.

(10) "Serious bodily injury" means bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death.

(11) "Substantial bodily injury" means bodily injury, not amounting to serious bodily injury, that creates or causes protracted physical pain, temporary disfigurement, or temporary loss or impairment of the function of any bodily member or organ.

(12) "Writing" or "written" includes any handwriting, typewriting, printing, electronic storage or transmission, or any other method of recording information or fixing information in a form capable of being preserved. 1996

## CHAPTER 2

### PRINCIPLES OF CRIMINAL RESPONSIBILITY

#### Part 1

#### Culpability Generally

#### Section

#### 76-2-101.

Requirements of criminal conduct and criminal responsibility.

## ADDENDUM B



1 criminal statute the same thing is required that,  
2 is that they have to establish whether or not that  
3 it's a court of competent jurisdiction and the way  
4 to do that is by filing it, allowing the  
5 challenge--

6           **THE JUDGE:** I think I've heard that  
7 argument about five or six times now. And I've, I  
8 understand your position. And you may turn out to  
9 be right. We'll see. But all I can tell you is as  
10 I look at the statutory scheme there is no clear  
11 answer. All I can tell you is the statute, the  
12 criminal statute which is being applied in this  
13 case does not refer to any such requirement. It  
14 leaves open for adjudication during these  
15 proceedings the question of whether a court of  
16 competent jurisdiction somewhere has issued a  
17 decree or Order which the defendant has violated in  
18 this State. And that's the only thing the State's  
19 required to prove so far as I can see from the  
20 statute.

21           I would rule differently, obviously, if  
22 this were a civil case and there was an, an attempt  
23 being made for the Court, to ask the Court to  
24 enforce civilly an Order because I think Holme vs.  
25 Smilowitz is right on point on that, in that

ADDENDUM C

1 competent jurisdiction at the time they issued it.

2 MR. OLIVER: So--

3 MR. BURNS: But isn't that, isn't that--  
4 The Court can't take judicial notice of the fact  
5 that (short inaudible).

6 THE JUDGE: Do you want me to read to you  
7 out of your prosecution manual?

8 MR. BURNS: Yes, you might have to.

9 THE JUDGE: It says that the proper way  
10 to raise that issue is to file a pretrial motion in  
11 limine and ask the Court to adjudicate whether the  
12 California Superior Court is a court of competent  
13 jurisdiction.

14 MR. BURNS: Well, I haven't done that,  
15 Your Honor.

16 THE JUDGE: And therefore, the issue is  
17 open for evidence. Now, that means that if  
18 there's evidence one way or the other then I, I'm  
19 going to have to receive it and let the jury decide  
20 the question unless you want me to make that  
21 determination as a threshold issue. But I don't  
22 think I can since it's an element of the offense.

23 Now the jury can draw their own  
24 conclusions as to the fact that Dennis S. Cole the  
25 Judge of the Superior Court of California issued

## ADDENDUM D

1 stipulation and a divorce decree setting forth six  
2 weeks visitation with an interim visit by Linda  
3 Pace after three weeks. The, the pleadings name  
4 Robert Friis and Linda Pace who have both been  
5 identified numerous times in this court. The  
6 parties have testified about the pleadings. And  
7 the pleadings, #P-1 and #P-2, exemplified, signed  
8 by the judge over his signature with that Superior  
9 Court on it have been tendered to this Court. So  
10 I think there is some proof to support the Court  
11 taking judicial notice.

12 THE JUDGE: Well, in addition I think  
13 that it is, it is generally known within the  
14 territorial jurisdiction of the, of this Court.  
15 But certainly capable of accurate and ready  
16 determination by resort to sources whose accuracy  
17 cannot reasonably be questioned what the court  
18 structure is in the, in the State of California and  
19 whether the California Superior Court has  
20 jurisdiction over domestic matters.

21 As a matter of fact, I'm well aware of the  
22 California system having been licensed in the State  
23 of California to practice law, having practiced  
24 there for five years before I moved to, to Utah in  
25 the, both the municipal courts and the superior

1 courts of that State. And I am well aware of the  
2 fact that the California Superior Court is  
3 analogous to the Utah District Court and that that  
4 court is the court that is charged with handling  
5 domestic matters, divorce matters. So as a matter  
6 of fact, it's known to me at least what the  
7 structure of the California system is. And I  
8 think it's capable of easy determination whether  
9 the California Superior Court is the court that  
10 would handle a domestic matter in that State.

11 I have the testimony before me that at the  
12 time of the separation the parties to the divorce  
13 in California were living in the State of  
14 California, in the County of San Bernardino. That  
15 Mr. Friis filed his divorce in that County and, and  
16 State. He's the one that chose the  
17 jurisdiction. That as a result of that filing  
18 the, an Order was issued by a judge of that court  
19 and that's been stipulated to.

20 I think that's enough to enable me to take  
21 jurisdiction of the fact that the California  
22 Superior Court is a court that would have  
23 jurisdiction over a divorce proceeding. And I  
24 think to that extent I'd be willing to take  
25 judicial notice and so instruct the jury.