

1977

# State of Utah v. Steven Craig Turner : Brief of Defendant-Appellant

Utah Supreme Court

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Sumner J. Hatch; Attorney for Defendant-Appellant;

Robert B. Hansen; Attorney General of Utah;

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IN THE SUPREME COURT

OF THE  
STATE OF UTAH

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THE STATE OF UTAH,  
  
Plaintiff-Respondent,  
  
v.

Case No. 14591

STEVEN CRAIG TURNER,  
  
Defendant-Appellant.  
-----

BRIEF OF DEFENDANT-APPELLANT

APPEAL FROM THE VERDICT AND CONVICTION IN THE  
DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH  
THE HONORABLE GORDON R. HALL PRESIDING

SUMNER J. HATCH  
Attorney for  
Defendant-Appellant  
370 East Fifth South  
Salt Lake City, Utah 84143

ROBERT B. HANSEN  
ATTORNEY GENERAL OF UTAH  
236 State Capitol  
Salt Lake City, Utah 84114

FILED

FEB 17 1977

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BRIEF OF DEFENDANT APPELLANT  
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## STATEMENT OF THE CASE

Appellant appeals from the judgment of the District Court in and for Salt Lake County, State of Utah, which found him guilty by a jury trial of violation of Section 76-6-302, Utah Code Annotated as amended in 1975.

## DISPOSITION IN THE LOWER COURT

On April 14 and 15, 1976, appellant was tried and convicted of aggravated robbery in violation of Section 76-6-302, Utah Code Annotated as amended in 1975. He was sentenced to the Utah State Prison for an indeterminate term of five years to life in prison.

## RELIEF SOUGHT ON APPEAL

Appellant petitions the court to hold Section 76-6-302, Utah Code Annotated as amended in 1975, unconstitutional as applied to this plaintiff and to vacate and reverse the District Court judgment or, in the alternative, to declare a mistrial and remand the case for further proceedings or, in the alternative, to find the defendant guilty of the lesser included offense of robbery under Section 76-6-301, Utah Code Annotated 1953.

## STATEMENT OF THE FACTS

On the 22nd day of July, 1975, Jerry Graham was robbed at Dan's Foodtown at 70th South and Highland Drive, Salt Lake County, State of Utah. On July 22, 1975, appellant was arrested in connection with the robbery, identified by Mr. Graham as assailant and on July 23, 1975, a complaint was filed accusing the appellant of aggravated robbery in violation of Section 76-6-302, Utah Code Annotated 1953 as amended in 1975. Trial by jury was held on April 14 and 15, 1976. After presentation of all the evidence, the following six instructions were given to the jury:

"Instruction No. 8: Under the law of the State of Utah, robbery is the unlawful and intentional taking of personal property in the possession of another from his or her person, or immediate presence, against the will of that person, and taking is accomplished by means of force or fear.

A person commits an aggravated robbery, which is a first degree felony, if, in the course of committing a robbery, that person uses a deadly weapon. A deadly weapon means anything that in the manner of its use or intended use is likely to cause death or serious bodily injury.

Under the law, an act of using a deadly weapon is deemed to be 'in the course of committing a robbery,' as that phrase is used in these instructions, if the use of a deadly weapon occurs in an attempt to commit, or during the commission of a robbery.

One acts 'unlawfully,' as in these instructions, if he takes personal property in the possession of another, as used in these instructions if the person takes the property wrongfully, without the consent of the owner, and with the deliberate intent to deprive the owner

Under the law, one acts intentionally or with intent with respect to the nature of his conduct or as a result of his conduct, when it is his conscious objective or desire to engage in the conduct or to cause the result.

Intent with which an act is done denotes a state of mind and connotes purpose in so acting. Intent, being a state of mind, is not always susceptible of proof by direct and positive evidence and may ordinarily be inferred from acts, conduct, statements and circumstances.

"Instruction No. 9: You are instructed that a firearm is not a deadly weapon unless it is loaded. The Utah Code defines when a weapon is deemed to have been loaded in 76-10-502, but if from the evidence you have a reasonable doubt as to whether or not the gun testified to in this case was loaded, you must find the defendant not guilty of aggravated robbery and consider the lesser included offense of robbery."

"Instruction No. 10: You are instructed that for the purposes of this case, that a "dangerous weapon" means any item that in the manner of its use or intended use is capable of causing death or serious bodily injury. In construing whether an item, object or thing not commonly known as a dangerous weapon is a dangerous weapon, the character of the instrument, object or thing; the character of the wound produced, if any; and the manner in which the instrument, object, or thing was used shall be determinative.

'Firearms' means pistols, revolvers, sawed-off rifle and/or any device that could be used as a weapon from which is expelled a projective by any force."

"Instruction No. 11: You are instructed that facsimile is defined as: An exact and precise copy of anything. An exact reproduction, for example, the signature reproduced by rubber stamp."

"Instruction No. 12: You are further instructed that a facsimile of a firearm is any instrument that by its appearance resembles a firearm."



"Instruction No. 13: Before you can convict the defendant of the crime of aggravated robbery, as charged in the Information, you must find from the evidence, beyond a reasonable doubt, all the following elements of that crime:

1. That on or about the 22nd day of July, 1955, in Salt Lake County, State of Utah, the defendant, Steven Craig Turner, unlawfully and intentionally took money or property from Jerry Graham.

2. That said property or money was in the possession or immediate presence of Jerry Graham.

3. That the taking of said money or property from Jerry Graham was accomplished by means of force or fear.

4. That in the course of taking said money or property the defendant, Steven Craig Turner, used a deadly weapon consisting of a firearm or a facsimile of a firearm.

If you believe that the evidence establishes each and all of the essential elements of the offense beyond a reasonable doubt, it is your duty to convict the defendant. On the other hand, if the evidence failed to so establish one or more of said elements then you should find the defendant not guilty of aggravated robbery and then consider the lesser included offense of robbery in accordance with the following instruction."

Closing arguments were then heard and the jury began its deliberations. After the jury had left the courtroom time was granted by the bench to except to the instructions. The State indicated it had no objections. Appellant objected to the above recited instructions (T.123-4) on the grounds that the instructions were confusing and conflicting and further objected to the statute as being unconstitutionally vague.

## POINTS ON APPEAL

### POINT I

SECTION 76-6-302 UTAH CODE ANNOTATED 1953 AS AMENDED IN 1975, IS VOID BECAUSE IT IS UNCONSTITUTIONALLY VAGUE AS APPLIED TO APPELLANT IN THIS CASE.

Section 76-6-302 insofar as it is pertinent to this case reads as follows:

"(1) A person commits aggravated robbery if in the course of committing robbery he:

(a) Uses a firearm or a facsimile of a firearm, knife or a facsimile of a knife or a deadly weapon;

The complaint under which appellant was charged reads:

"That the said Steven Craig Turner, at the time and place aforesaid, robbed Jerry Graham, and in so doing, used a deadly weapon, to wit: a gun or facsimile thereof;" (R.8)

The complaint charged defendant with using a gun or facsimile thereof and that it was a deadly weapon. Although the complaint reads in accordance with the statute, the difficulty in this case arose when the court attempted to interpret the word "facsimile".

The term "facsimile" has been defined in a very few dissertations on the law, but it does appear at least twice as follows:

"FACSIMILE. An exact copy, preserving all the marks of the original." (Blacks Law Dictionary; 35 C.J.S.)

The common meaning of the word as given in Websters New Unabridged Dictionary, Second Addition, is the same:

1. Act of making a copy, imitation.
  2. An exact and detailed copy of anything, as of a book, document, painting, or statute;"
- Syn. See duplicate. (emphasis added)

Appellant's research has produced no case law that defines the term. One case has defined the word "imitation":

"The word 'imitation' when applied to pistols and revolvers means so nearly resembling the genuine as to mislead." People v. Delgado, 146 N.Y.S. 2d 350 at 356; 1 Misc 2d 821 (1955) (Emphasis added)

From the above, it is clear then that the term "facsimile" means "an exact copy" whether one examines the meaning or the legal meaning and that even an imitation means same. In People v. Delgado, supra, the court went on to use examples of cap guns and water pistols. Clearly the evidence in this case does not even approach the meaning of these words. Mr. Graham testified that he saw an inch to an inch and a half of a hollow tube: (T. 10 and T.22)

Q. Now, you indicated you saw about an inch and a half of a gun pointing out of a shirt, is that what you stated?

A. Yes, sir.

Q. Would you explain to me what you mean pointing out of his shirt?

A. He had his hand under the barrel, was just up under his shirt. All I could see of the shirt down over it was an inch and a half of the barrel.

Q. Did the barrel have a sight on?

A. No, just a round short --

"Q. Sure it wasn't a piece of pipe?

A. I don't believe it to be, no.

Q. Very polished? Well, how did he have his hand in his shirt with the gun poking out?

A. He just had it under his shirt with his gun stuck under coming out here. (Indicating.) And he was toward me this way so I couldn't see how he had his hand.

Q. Was his shirt tucked in?

A. Yes. It was.

Q. Well, all you saw was something shiny and round without a sight on it, is that correct?

A. Yes, sir.

Q. You're sure you didn't give the police any further description of what you've told us here today?

A. No. Not that I recall at this time, no."

In its jury instructions the court expanded the meaning of the term "facsimile" well beyond its proper meaning.

Instruction #12 reads:

"You are further instructed that a facsimile of a firearm is any instrument that by its appearance resembles a firearm."

When Instruction 12 is read with Instruction 11, which requires that a facsimile be an "exact and precise copy", it is clear that Instruction 12 opens the door to a vast area of definition and interpretation. In effect, Instruction 12 cancels and eliminates the need for Instruction 11 and the jury might be persuaded by something other than an exact duplicate.

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When Instruction 12 is read together with Instruction 9, the vagueness is even more pronounced. In Instruction 9 the court instructs the jury that they must find that the gun was loaded, while in Instruction 12, the object need not even be a gun and no instruction indicates that the facsimile need be dangerous or deadly, but need only resemble, in some unknown way, a gun. Clearly, the instructions have so distorted the meaning of the words of the statute that they have no meaning whatsoever. As applied in this case, the statute is vague and therefore unconstitutional.

The statute must give fair notice of what is prohibited. People v. Barksdale, 105 Cal. Rptr 1, 8C3d 320, 503 P.2d 257 (1972); People v. Carcia, 541 P.2d 687 (Colo. 1975); People v. Gonzales, 534 P.2d 626 (Colo. 1975); State v. Kimball, 54 Haw. 503 P.2d 176 (1972); Hildahl v. State, 536 P.2d 1298 (Okl. Cr. Ct. 1975); Combs v. State, 536 P.2d 373 (Okl. Cr. Ct. 1975); State v. Martinez, 85 Wash. 2d 671, 538 P.2d 521 (1975); Blondheim v. State, 84 Wash. 2d 874, 529 P.2d 1096 (1975); State v. Packard, 121 Wash. 2d 369, 250 P.2d 561. The instructions in this case leave absolutely no standard as to the meaning of the word facsimile. The object could have been a three-inch piece of rubber tubing painted gray plastic tubing or any number of things that are neither dangerous or deadly and still appellant could have been convicted of armed robbery. Furthermore, under the jury instructions in this case the entire object need not resemble a gun. Mr. Graham

saw one inch of the object and that inch only looked like part of a gun, yet appellant was convicted.

Appellant submits that the District Court's instructions so changed the meaning of the statute as to leave it vague and uncertain, and therefore unconstitutional, as applied to appellant.

## POINT II

THE INSTRUCTIONS GIVEN BY THE DISTRICT COURT ARE CONFLICTING AND CONTRADICTORY.

1. Instruction number 8 defines a deadly weapon in the following manner:

"A deadly weapon means anything that in the manner of its use or intended use is likely to cause death or serious bodily injury."  
(emphasis added)

Instruction 8 requires the jury to find that a deadly weapon, as defined in the instruction, was used by appellant. It will be observed that the instruction defines a deadly weapon in terms of the probability of its causing death.

The court then gives Instruction 10 on dangerous weapons:

"...a 'dangerous weapon' means any item that in the manner of its use or intended use is capable of causing death or serious bodily injury."

Although Instruction 10 is appellant's instruction, appellant submits that the two instructions together are conflicting, contradictory and confusing.

Having the capacity to kill is a more expansive definition than the likelihood of killing. In no instruction

does the court explain the difference in the two terms, even after appellant's objection that the two instructions were contradictory. It is entirely possible for the jury to have found appellant guilty on the more comprehensive definition than on the meaning of the term "deadly weapon", the term appellant was charged with. It was possible for the jury to have been confused with both terms and assumed them to have been the same. Taken together, the two definitions are confusing and erroneous. State v. Hendricks, 123 Ut. 267, 258 P.2d 452 (1951); State v. Wheeler, 70 Id. 455, 220 P.2d 687 (1948).

2. Instruction 8 requires the appellant to have used a deadly weapon. Instruction 9 requires that if the object used was a gun that it had to be loaded before it could be classified as a deadly weapon and that if the gun was not loaded the jury could not find appellant guilty of aggravated robbery. Instruction 10 then defines a dangerous weapon. Without an explanation as to the reason for the use of the definition the jury could then believe that this third definition would also suffice to convict. Instruction 12 then defines facsimile in broad terms and does not require that a facsimile be loaded, dangerous or deadly, nor does it require that the facsimile be likely or capable of causing death. In essence then, the jury now has a fourth reason, separate and distinct from the first three, to convict. Finally,

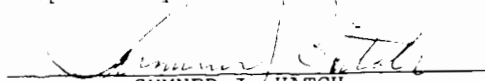
Instruction 13 is given which leaves the impression that a gun or facsimile of a gun is per se a deadly weapon. The instructions, therefore, have left the jury with at least five possible methods of convicting, all contradictory, and appellant is the recipient of the effects. State v. Hendricks, supra; State v. Wheeler, supra.

3. It should be pointed out that the complaint charged appellant with use of a deadly weapon and that the deadly weapon was a gun or facsimile of a gun. The instructions, however, expand the complaint to include the ones other than a deadly gun. It is contrary to law to expand the theory of law beyond the limits of the complaint in the instructions. State v. Anderson, 100 Ut. 468, 116 P.2d 398.

#### CONCLUSION


Section 76-6-302 as applied in this case is unconstitutional. The instructions given to the jury were contradictory, confusing and over-expansive and, therefore, erroneous and contrary to law. Appellant, therefore, submits that this court should reverse the lower court's decision or, in the alternative, find the defendant guilty of the lesser included offense of robbery under Section 76-6-301, Utah Code Annotated 1953.

Respectfully submitted.

  
SUMNER J. HATCH  
Attorney for Defendant Appellant



Mailed two copies of the foregoing Brief to Mr.  
Mr. Robert B. Hansen, Attorney General of Utah, 236 State  
Capitol, Salt Lake City, Utah 84114, postage prepaid, this  
17th day of February, 1977.

  
SUMNER J. HATCH