

1996

West Valley City v. Dawn Sweazey : Brief of Appellee

Utah Court of Appeals

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J. Richard Catten; Office of the West Valley City Prosecutor; Counsel for Plaintiff/Appellee.

Mark J. Gregersen; L. Bruce Larsen; Larsen & Rammell; Co-Counsel for Defendant/Appellant.

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IN THE UTAH COURT OF APPEALS

WEST VALLEY CITY,	:	
	:	
Plaintiff/Appellee,	:	
	:	Case No. 960724-CA
v.	:	
	:	Priority No. 2
DAWN SWEAZEY,	:	
	:	
Defendant/Appellant.	:	

BRIEF OF THE APPELLEE

Appeal from the Third Judicial District Court,
West Valley Department,
in and for Salt Lake County, State of Utah;
the Honorable Ronald E. Nehring

UTAH COURT OF APPEALS

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960724-CA

J. Richard Catten (#4291)
Senior Attorney
WEST VALLEY CITY
3600 Constitution Boulevard
West Valley City, Utah 84119
(801) 963-3271

Attorney for Plaintiff/Appellee

Mark J. Gregersen (#6553)
P.O. Box 456
Centerville, Utah 84014
(801) 296-8272

L. Bruce Larsen (#1893)
LARSEN & RAMMELL
3600 Market Street, Suite 100
West Valley City, Utah 84119
(801) 964-1200

Attorneys for Defendant/Appellant

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J. Richard Catten (#4291)
Senior Attorney
WEST VALLEY CITY
3600 Constitution Boulevard
West Valley City, Utah 84119
(801) 963-3271

Attorney for Plaintiff/Appellee

Mark J. Gregersen (#6553)
P.O. Box 456
Centerville, Utah 84014
(801) 296-8272

L. Bruce Larsen (#1893)
LARSEN & RAMMELL
3600 Market Street, Suite 100
West Valley City, Utah 84119
(801) 964-1200

Attorneys for Defendant/Appellant

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STATEMENT OF JURISDICTION

Appellate jurisdiction over this case is rested in the Utah Court of Appeals pursuant to Section 78-2a-3(2)(e), Utah Code Annotated 1953, as amended.

STATEMENT OF THE ISSUES

I. WAS SUFFICIENT EVIDENCE PRODUCED AT TRIAL TO SUPPORT THE JURY'S CONVICTION OF DAWN SWEAZEY ON FIVE COUNTS OF VARIOUS ZONING AND HEALTH CODE VIOLATIONS; AND, HAS SWEAZEY FAILED TO MARSHAL THE EVIDENCE SUPPORTING THE JURY'S VERDICT?

Standard of Review: When examining the sufficiency of the evidence in a criminal trial, the appellate court should review the evidence and all inferences that may reasonably be drawn from it in the light most favorable to the verdict of the jury, and should only reverse a conviction when the evidence is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the Defendant committed the crime of which she was convicted. *State v. Gibson*, 908 P.2d 352 (Utah App. 1995).

The Utah Court of Appeals has also stated:

In order to bring a claim of insufficiency of evidence, an appellant "must marshal the evidence supporting the . . . findings and demonstrate how the evidence, including all reasonable inferences drawn therefrom, is insufficient to support the disputed findings." *State v. Peterson*, 841 P.2d 21, 25 (Utah App. 1992). Failure to marshal the evidence waives an appellant's right to have his claim of insufficiency considered on

appeal. *State v. Moore*, 802 P.2d 732, 738 (Utah App. 1990).

State v. Gallegos, 851 P.2d 1185, 1189-1190 (Utah App. 1993).

II. IS SECTION 7-2-117(2) OF THE WEST VALLEY CITY CODE UNCONSTITUTIONAL?

Standard of Review: This issue was not raised below, and should be reviewed under the "plain error" standard.

To establish plain error, defendant must show that: "(i) An error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful." *State v. Dunn*, 850 P.2d 1201, 1208 (Utah 1993). An error is harmful if, "absent the error, there is a reasonable likelihood of a more favorable outcome" for the defendant, or "our confidence in the verdict is undermined." *Id.* at 1208-09.

State v. Perez, 946 P.2d 724, 728 (Utah App. 1997).

III. DID THE TRIAL COURT ERR IN ALLOWING THE JURY TO BE TOLD THAT CERTAIN PHOTOGRAPHS PLACED INTO EVIDENCE HAD BEEN TAKEN ON THE VIOLATION DATE, JANUARY 27, 1995, BECAUSE THE CITY HAD STIPULATED TO SAID DATE, WHEN, IN FACT, IT WAS KNOWN TO BOTH PARTIES AND THE TRIAL COURT THAT THE PHOTOGRAPHS WERE NOT TAKEN ON JANUARY 27, 1995, AND THAT THE STIPULATION HAD BEEN MADE IN ERROR?

Standard of Review: It is within the discretion of the trial court to set aside stipulations of the parties. *State v. Velasquez*, 672 P.2d 1254 (Utah 1983). Therefore, this issue should be reviewed on a "abuse of discretion" standard.

**DETERMINATIVE CONSTITUTIONAL PROVISIONS,
STATUTES, ORDINANCES, AND RULES**

See *Addendum* for the following determinative statutes and ordinances:

Utah State Code (1995)

§ 10-9-804. Maps and plats required.

West Valley City Code (1995)

§ 7-1-103. Definitions.

§ 7-2-113. Measurement of Setback.

§ 7-2-117. Fences.

§ 7-6-303. Permitted Uses.

§ 7-6-305. Minimum Lot and Setback Requirements.

§ 24-2-111. Accumulation of Solid Waste and Littering.

§ 24-8-105. Real Property to Be Kept Clean and Secured.

STATEMENT OF THE CASE

NATURE OF THE CASE

This case involves prosecution and conviction in the Third Judicial District Court, West Valley Department, Salt Lake County, State of Utah, for the following violations:

<u>Count</u>	<u>WVC Code Violation</u>	<u>Penalty Type</u>
1	7-1-108 Building Permit	Infraction (*)
2	7-1-108 Building Permit	Infraction (*)
3	7-2-111 Clear View of Intersection	Infraction (*)

<u>Count</u>	<u>WVC Code Violation</u>	<u>Penalty Type</u>
4	7-2-117 Fence	Infraction
5	7-6-305 Minimum Lot Setback	Infraction
6	7-6-303 Permitted Use, Single-Family Residential Zone	Infraction
7	24-2-111 Accumulation of Solid Waste	Class B Misdemeanor
8	24-2-111 Accumulation of Solid Waste	Class B Misdemeanor
9	24-8-105 Real Property Kept Clean	Class B Misdemeanor

(*) = *dismissed*

COURSE OF PROCEEDINGS

Prosecution in this case was commenced by the filing of an Information against Defendant Dawn Sweazey on March 27, 1995. Record, p. 1. On May 1, 1995, Sweazey filed a Jury Trial Demand and Defendant's Discovery Requests. Record, pp. 4 and 6. A pretrial conference was held before Judge William A. Thorne on October 3, 1995; however, the case was not resolved and was set for jury trial. Sweazey filed several pretrial motions, which were heard before Judge Thorne on October 30, 1995; before Judge Judith S. Atherton on December 12, 1995, and January 22, 1996; and before Judge Carlos A. Esqueda on March 11, 1996. Following the motion hearings, the City filed an Amended Information on March 21, 1996. Record, pp. 88-89.

On August 21, 1996, a jury trial on the charges set forth in the Amended Information was held before Judge Ronald E. Nehring. Judge Nehring dismissed Charges 1, 2, and 3, and, at the conclusion of the trial, the jury found Sweazey guilty of the remaining six charges. Sweazey filed Defendant's Motion for Judgment Notwithstanding the Verdict on September 3, 1996. Record, p. 153. At a hearing held on September 30, 1996, Judge Nehring denied Sweazey's Motion for Judgment Notwithstanding the Verdict and her Motion for a New Trial and sentenced Sweazey as set forth below.

DISPOSITION IN TRIAL COURT

On August 21, 1996, a jury convicted Sweazey of Counts 4 through 9 and imposed the following fines and assessments:

<u>Count</u>	<u>Fine/Assessment</u>
4	\$40 fine
5	\$40 fine
6	\$40 fine
7	\$250 fine (\$200 suspended); 180 days jail (suspended)
8	\$250 fine (\$200 suspended); 180 days jail (suspended)
9	\$250 fine (\$200 suspended); 180 days jail (suspended)

Record, p. 163. Sweazey filed her Notice of Appeal with the Court of Appeals on November 4, 1996. Record, p. 166.

STATEMENT OF FACTS

1. Dawn Sweazey is the owner of a residential house and lot located at 7174 West Tenway, West Valley City, Utah. Transcript, p. 39, lines 8-10; p. 57, lines 23-26; p. 58, line 1.

2. On January 27, 1994, the West Valley City Ordinance Enforcement Division received a complaint of inoperable vehicles, debris, and a trailer full of yard debris located on Sweazey's property. Transcript, p. 40, lines 5-12.

3. Officer Terri Nordell of the West Valley City Ordinance Enforcement Division viewed the property on February 1, 1994, and attempted to serve Sweazey with a violation notice, which Sweazey refused to accept. Transcript, p. 40, lines 12-22.

4. Following several follow-up visits and written notices over the course of 1994, Sweazey exercised her right to an administrative hearing regarding the condition of her property. The administrative hearing was held on December 6, 1994. Transcript, p. 52, lines 17-26; p. 53, lines 1-9.

5. Following the administrative hearing, Sweazey was ordered to correct certain conditions existing on her property. Transcript, p. 54, lines 13-26; p. 55, lines 1-26; and Trial Exhibit 12.

6. Officer Nordell visited the property on January 16, 1995, and found that Sweazey had not complied with the terms of the notice. Officer Nordell took certain photographs that were marked

as trial Exhibits 13, 14, 15, 16, and 17. Transcript, p. 56, lines 1-21; p. 58, lines 2-7.

7. Officer Nordell returned to the Sweazey property on January 27, 1995, and observed the property to be essentially in the same condition as it was on January 16, 1995. Transcript, p. 60, lines 1-7.

8. On March 27, 1995, the City filed an Information, charging Sweazey with violations observed by Officer Nordell on January 27, 1995.

9. No photographs actually taken by Officer Nordell on January 27, 1995, were entered into evidence at trial; however, based on the trial court's ruling to enforce an earlier stipulation by the City, it was inaccurately represented to the jury that the photographs comprising Exhibits 19 through 23 at trial were taken on January 27, 1995. Transcript, pp. 4-21.

SUMMARY OF THE ARGUMENTS

I. THE EVIDENCE PRESENTED BY THE CITY WAS SUFFICIENT TO SUPPORT THE JURY'S GUILTY VERDICT ON EACH CHARGE, AND SWEAZEY FAILED TO MARSHAL THAT EVIDENCE IN HER BRIEF.

Sweazey relies on the photographs that were admitted as Exhibits 19 through 23 at trial. The photographs purport to show the Sweazey property in a condition that does not violate the ordinances with which she was charged. She now uses these photographs to argue that insufficient evidence exists to convict

her of the charges. Her argument is without merit, since the photographs are not competent evidence. It was known to both parties and the trial court that the photographs were not taken on the violation date, January 27, 1995, but, rather, were taken sometime before that date. Based on a ruling by the trial court, the jury was informed that the parties had stipulated the photographs were taken on January 27, 1995, even though everyone but the jury knew that that was not a factual statement.

Despite the confusion regarding the date of the photographs, competent testimonial evidence, which was not inconclusive or inherently improbable and which supports the jury's verdicts of guilty on Counts 4 through 9 of the Amended Information, was presented to the jury.

Sweazey has failed to comply with the Court's marshaling requirements in her Brief. In making her argument, Sweazey neglected to marshal virtually all of the evidence presented supporting the jury's verdicts. By failing to marshal the evidence against her, Sweazey has waived her right to raise an "insufficiency of the evidence" claim on appeal.

**II. SECTION 7-2-117(2) OF THE WEST VALLEY
CITY CODE REGARDING SETBACKS OF SIDE YARD
FENCES IS NOT UNCONSTITUTIONAL.**

Sweazey has failed to specify with any particularity the section of the West Valley City ordinances she believes to be unconstitutional. She has also failed to describe which provision

of the Constitution it offends and which Constitution, the United States Constitution or the Utah Constitution, she is referring to. Finally, Sweazey fails to assert any credible basis for a finding of unconstitutionality.

III. THE TRIAL COURT ERRED BY HOLDING THE PARTIES TO A STIPULATION THAT HAD BEEN BASED ON A MISTAKE OF FACT AND, THEREBY, CAUSED MISINFORMATION TO BE PRESENTED TO THE JURY.

Prior to trial, the City had stipulated that certain photographs, later marked as Exhibits 19 through 23, had been taken on the alleged violation date, January 27, 1995. Prior to trial, it became apparent that the stipulation was based on a mistake of fact, and that the photographs had not been taken on January 27, 1995, but sometime prior to that date. Despite the mistake of fact, the trial court ruled that the City would be held to the stipulation. This resulted in the jury's being misinformed as to the actual date the photographs were taken. The trial court clearly had the power to set aside the stipulation based on a mistake of fact, yet failed to do so.

DETAIL OF THE ARGUMENTS

I. THE EVIDENCE PRESENTED BY THE CITY WAS SUFFICIENT TO SUPPORT THE JURY'S GUILTY VERDICT ON EACH CHARGE, AND SWEAZEY FAILED TO MARSHAL THAT EVIDENCE IN HER BRIEF.

Appellant Dawn Sweazey's consistent theme throughout her Brief is that the evidence presented to the jury was contradicted by

certain photographs and, therefore, was insufficient to support her convictions. In pursuing her argument, she relies on a series of photographs, Exhibits 19 through 23, that were presented at trial. The photographs purport to show the Sweazey property in a non-violating condition on the date the violations are alleged to have occurred, January 27, 1995. However, Sweazey's reliance on the photographs is without merit, since the photographs are not competent evidence. It is clear from pretrial argument that both parties and the trial court judge were aware that the photographs had not been taken on January 27, 1995, but, rather, sometime prior to that date. Even if the photographs were competent evidence, the mere existence of conflicting evidence does not warrant reversal of a conviction. *State v. Warden*, 813 P.2d 1146 (Utah 1991).

At a previous proceeding, the City had erroneously stipulated that the photographs comprising Exhibits 19 through 23 had been taken on the violation date. This error was brought to the attention of the trial court immediately prior to trial, and a lengthy argument ensued regarding the presentation of the exhibits to the jury. Transcript, pp. 4-21. Following the argument, the trial court judge ruled that the City would have to stand by its previous stipulation, and that the jury would be told that the City had stipulated that Exhibits 19 through 23 were photographs that had been taken on January 27, 1995. Transcript, p. 20, lines 12-24. The ruling was made with the trial court's full knowledge that

the stipulation was in error. Transcript, p. 8, lines 10-18; p. 22, lines 18-20; p. 23, lines 2-11. Even Sweazey admits in her Brief that "photos 19 through 23 fail to show the status of the property as of the alleged violation date of January 27, 1995." Appellant's Brief, p. 12, lines 2-3.

Given the obvious confusion caused by telling the jury the incorrect date of the photographs, it is not surprising that the jury chose to rely on the other evidence presented at trial. On each count, there was sufficient evidence presented to the jury to sustain a conviction. The evidence can be summarized as follows.

COUNT 4: "FENCE" VIOLATION
(WEST VALLEY CITY CODE § 7-2-117(2))

"DEFENDANT FAILED TO KEEP A 20 FOOT SETBACK FROM THE
FRONT OF HER PROPERTY AND INSTEAD HAS A 5 FT SOLID FENCE
BUILT UP TO THE SIDEWALK."

Amended Information - Record, pp. 88-89.

The City's witness at trial was Officer Terrie Nordell of the West Valley City Ordinance Enforcement Division. Officer Nordell testified that a front yard setback, for the purposes of the City's ordinance, is considered from the front of the house to the sidewalk, from property line to property line. Transcript, p. 62, lines 1-2. She also testified that the ordinance requires that within the 20-foot setback, a fence or wall must be at least 50 percent open, or, in the alternative, can only be two feet high. Transcript, p. 58, lines 15-17.

The height and location of the "fence" (which is actually a solid, cinder block wall) was uncontroverted at trial. Officer Nordell testified that the height of the fence was approximately four and a half feet (Transcript, p. 59, lines 12-18), and that it was present on January 27, 1995 (Transcript, p. 61, lines 9-11). Finally, Sweazey stipulated at trial that the fence was four feet in height and extended along the side yard boundary of the property, all the way to the front sidewalk. Transcript, p. 46, lines 13-17; p. 58, lines 22-25.

The evidence presented at trial with regard to the fence violation is not inconclusive or inherently improbable and is sufficient to sustain the verdict of the jury.

COUNT 5: "MINIMUM LOT SETBACK" VIOLATION
(WEST VALLEY CITY CODE § 7-6-305(1))

"DEFENDANT HAS BLOCKS AND A BOX CAR IN THE SET BACK AREA
OF HER PROPERTY."

Amended Information - Record, pp. 88-89.

The testimony of Officer Nordell at trial provided sufficient evidence that a "boxcar" was present within the front yard setback on January 27, 1995. First, Officer Nordell testified that the boxcar was present when she visited the property and took photographs on January 16, 1995. Transcript, p. 58, lines 2-7. She further testified that she visited the property on the violation date, January 27, 1995, and that the conditions had not changed since her visit on January 16. Transcript, p. 60, lines 1-

7. Finally, Officer Nordell testified that the boxcar was located between seven and ten feet from the sidewalk, clearly within the area she had previously testified comprised the front yard setback of the Sweazey home. Transcript, p. 62, lines 9-17.

The evidence presented by the City with regard to the minimum lot setback violation is not inconclusive or inherently improbable and is sufficient to sustain the verdict of the jury.

COUNT 6: "PERMITTED USE" VIOLATION
(WEST VALLEY CITY CODE § 7-6-303)

"DEFENDANT IS STORING A LARGE BOX CAR ON HER PROPERTY
WHEN SUCH IS NOT PERMITTED IN A RESIDENTIAL ZONE."

Amended Information - Record, pp. 88-89.

Officer Nordell's testimony regarding the presence and location of the boxcar on the Sweazey property on January 27, 1995, has been outlined above. Officer Nordell also testified that the location of the boxcar on the Sweazey property was not a permitted use in an R-1-6 (Residential) Zone. Transcript, p. 62, lines 18-21. Finally, Officer Nordell testified that she had access to the permits that would had to have been issued in order to legally move the boxcar onto the property. Transcript, p. 60, lines 23-24. Officer Nordell stated that she had checked those permits, that a permit had not been issued to Sweazey, and, therefore, that the boxcar had been moved onto the property without a permit. Transcript, p. 60, lines 20-26; p. 61, lines 1-6; p. 62, lines 18-23.

The evidence presented by the City at trial with regard to the permitted use violation is not inconclusive or inherently improbable and is sufficient to sustain the verdict of the jury.

COUNT 7: "ACCUMULATION OF SOLID WASTE" VIOLATION
(WEST VALLEY CITY CODE § 24-2-111)

"DEFENDANT ACCUMULATED, THREW, DISCARDED, DEPOSITED, PLACED, SWEEPED, DUMPED, CONDUCTED OR ALLOWED ANOTHER TO DO THE SAME ON HER PROPERTY, TREE LIMBS, BROKEN BRICKS AND ASSORTED OTHER TRASH."

Amended Information - Record, pp. 88-89.

There was ample evidence presented at trial to support a finding that bricks, wood, and other trash were located on the Sweazey property. With regard to bricks, Officer Nordell testified that the pile of broken bricks was present on January 16, 1995. Transcript, p. 56, lines 1-6; p. 57, lines 10-12. The bricks are shown in the photographs marked as Exhibits 13, 14, and 15. Officer Nordell also testified that the bricks were present when she visited the property on the violation date, January 27, 1995 (Transcript, p. 63, lines 7-17) and were even present when she visited the property sometime after the violation date (Transcript, p. 67, lines 2-4).

It was also Officer Nordell's testimony that she observed other solid waste when she viewed the property on the violation date, January 27, 1995. She stated that she observed an old dishwasher, kitchen chairs, and some wood mixed in with the bricks. Transcript, p. 63, lines 7-26; p. 64, lines 1-8.

The evidence presented at trial with regard to the "accumulation of solid waste" violation is not inconclusive or inherently improbable and is sufficient to sustain the verdict of the jury.

COUNT 8: "ACCUMULATION OF SOLID WASTE" VIOLATION
(WEST VALLEY CITY CODE § 24-2-111)

"DEFENDANT HAS ON HER PROPERTY 2 UNLICENSED OR INOPERABLE VEHICLES AND VEHICLE PARTS."

Amended Information - Record, pp. 88-89.

This charge of accumulation of solid waste was based on inoperable vehicles located on the Sweazey property. Officer Nordell testified that when she visited the Sweazey property on January 16, 1995, one of the vehicles in question, a *Camaro*, was on the property behind the boxcar. Transcript, p. 64, lines 18-19. She testified that the other two vehicles that had been on the property had been moved across the street to Sweazey's son's property and were still licensed and inoperable. Transcript, p. 64, lines 19-21. Officer Nordell also testified that when she visited the property on the violation date, January 27, 1995, the property and the violations thereon were unchanged from her January 16 visit. Transcript, p. 60, lines 1-7.

Based on the foregoing, the jury had sufficient evidence to conclude that the *Camaro* was located on the Sweazey property on January 27, 1995, thereby providing sufficient evidence to support the verdict of the jury.

COUNT 9: "REAL PROPERTY KEPT CLEAN" VIOLATION
(WEST VALLEY CITY CODE § 24-8-105(4))

"DEFENDANT HAS OR MAINTAINS ON HER PROPERTY UNSIGHTLY OR
DELETERIOUS OBJECTS OR STRUCTURES ON THE PROPERTY WHICH
SHE OWNS OR RESIDES."

Amended Information - Record, p. 88-89.

The parties had stipulated that Sweazey is the owner of the property. Transcript, p. 57, lines 23-26; p. 58, line 1. Also, it is uncontroverted that Sweazey received notice that her property was in violation, and that she was required to clean it. A copy of the notice was presented as evidence and marked as Exhibit 12. Transcript, p. 54, lines 13-26. Officer Nordell testified that Sweazey had been given notice to clean the property and had failed to do so. Transcript, p. 64, lines 22-26; p. 65, lines 1-3. This is further substantiated by Officer Nordell's testimony, which is set forth above, with regard to the inoperable vehicles, bricks, appliances, chairs, and wood, which she has previously testified were still present on the property on the violation date.

The evidence presented with regard to the real property kept clean violation is not inconclusive or inherently improbable and is sufficient to support the verdict of the jury.

FAILURE TO MARSHAL THE EVIDENCE

Virtually all of the evidence presented above is absent from Sweazey's Brief. Sweazey has utterly failed to comply with the previous rulings of this Court requiring an appellant to marshal all of the evidence supporting the findings and then demonstrate

how, even given that evidence, the jury has come to the wrong conclusion. This Court has repeatedly stated that in order to properly marshal the evidence, the appellant must present every scrap of competent evidence introduced at trial that supports the findings the appellant is disputing. *Oneida/SLIC v. Oneida Cold Storage and Warehouse, Inc.*, 872 P.2d 1051 (Utah App. 1994). In this case, the Appellant has fallen woefully short of meeting the marshaling requirement. That failure provides an independent ground to sustain the verdicts reached by the jury. By failing to marshal the evidence, the Appellant has waived her right to have a claim of insufficiency of evidence considered on appeal. *State v. Gallegos*, 851 P.2d 1185 (Utah App. 1993).

Based on the foregoing, it is clear that for each and every count upon which the jury reached a verdict of guilty, there was sufficient competent evidence presented at trial to support that verdict. Also, it is obvious that Sweazey has utterly failed to meet the marshaling requirements set forth by this Court and, therefore, has waived her right to raise an insufficiency of the evidence claim on appeal.

**II. SECTION 7-2-117(2) OF THE WEST VALLEY
CITY CODE REGARDING SETBACKS OF SIDE YARD
FENCES IS NOT UNCONSTITUTIONAL.**

Sweazey contends, in Argument "A" of her Brief (Appellant's Brief, p. 9), that the West Valley City ordinance regarding fence

setbacks is unconstitutional. Her argument is wholly without merit.

Sweazey fails to specify which ordinance she contends is unconstitutional. She makes a vague reference to a "prior subsection" specifying that property lines shall be designated on the "official" plats kept by the County Recorder. Appellant's Brief, p. 9, lines 10-11. The Appellee has been unable to locate a West Valley City ordinance defining the front yard setback that defines "property line" as Sweazey describes. To the contrary, the appropriate measurement is from the right-of-way line as shown on the official map, which is defined at Section 7-1-103(119) of the West Valley City Code, or from the existing right-of-way line. The ordinance that governs the measurement of setbacks is Section 7-2-113 of the West Valley City Code, which specifically states as follows:

7-2-113. MEASUREMENT OF SETBACK.

Wherever a front yard is required for a lot facing on a street for which an official map has been recorded in the office of the County Recorder, the depth of such front yard shall be measured from the mapped street line provided by the official map. Where an official map has not been recorded, measurements shall be made from the existing right-of-way line or from the proposed right-of-way line, as indicated on the major street plan.

In this case, Officer Nordell testified that she considered the sidewalk to be the front setback line. Since sidewalks are public right-of-way, it is apparent that Officer Nordell was

measuring from the existing right-of-way line. Since both the testimony and the stipulation of the parties established that the fence ran along the side yard property line right up to the sidewalk, there is little possibility that any reasonable person would not understand that it lies within the front yard setback area.

Sweazey fails to specify which section of the Constitution or even which Constitution, the United States Constitution or the Utah Constitution, she feels is being violated. However, she seems to contend that plats recorded by the County Recorder cannot establish property lines. This is obviously not true. Plats are a well established method of establishing property boundaries, particularly when subdividing larger parcels of property into lots. Utah Code Ann. § 10-9-804 (1953). Furthermore, it has long been recognized that, "Where there is a recorded plat, the conveyance of land by designation of lot number and block number and name of the plat or subdivision passes the title of the grantors the same as if such lots had been described by metes and bounds." *Hall v. North Ogden City*, 166 P.2d 221 (Utah 1946).

Sweazey has failed to provide this Court with a description of the very subsection she believes to be defective, a description of the Constitution and/or constitutional provision she believes to be violated, and any credible argument as to why such subsection

should be found unconstitutional. This Court should disregard Sweazey's argument and affirm the verdicts of the jury.

**III. THE TRIAL COURT ERRED BY HOLDING THE
PARTIES TO A STIPULATION THAT HAD BEEN
BASED ON A MISTAKE OF FACT AND, THEREBY,
CAUSED MISINFORMATION TO BE PRESENTED TO
THE JURY.**

West Valley City believes that much of the confusion in this case is the result of an erroneous ruling by the trial court judge. That ruling allowed incompetent evidence to come before the jury, and the incompetent evidence forms the basis for much of Sweazey's argument in her appeal.

The problem arose when, at a prior deposition and in a hearing before the court, the West Valley City Prosecutor stipulated that the photographs that eventually became Exhibits 19 through 23 had been taken on the violation date, January 27, 1995. Upon reviewing the file with the Ordinance Enforcement Officer prior to trial, it became apparent that the stipulation was based on a mistake of fact, and that the photographs could not have been taken on that date. Immediately prior to trial, Sweazey argued to the court that since the City had previously stipulated that the photographs were taken on the violation date, the City must be held to that stipulation, and the jury must be told that the photographs represented the condition of the property on January 27, 1995. This was clearly to Sweazey's advantage, since many of the photographs showed the violations absent from the property. The

City urged the court to set aside the stipulation and allow the accurate date of the photographs to be presented to the jury.

It is apparent from the transcript of the hearing that both parties and the court were aware that the stipulation was in error. Transcript, pp. 4-21. Initially, it was the trial court's inclination to set aside the stipulation. The court stated:

I find, however, that in my view we are here in part to seek the truth. And it would be also offensive to me if the photographs were introduced into evidence in this trial and it were placed on the record that the photographs were taken on a date that everyone knew wasn't the right date of the photograph and, in fact, the photographs were communicating to the jury an inaccurate picture of whatever they were supposed to portray and we all knew it except the jury by virtue of a ruling of estoppel.

Transcript, p. 8, lines 10-18.

Ultimately, however, the trial court, apparently believing it to be legally bound to accept the stipulation, ruled that the jury would be told the incorrect date of the photographs. The court stated, "I am going to find that the City is going to be bound by its stipulation relative to the dates of the photographs and may not at the trial introduce evidence of dates contrary to the stipulation." Transcript, p. 20, lines 12-15. The City had a continuing objection to this ruling. Transcript, p. 20, lines 25-26.

The ruling of the trial court was clearly in error. Utah law establishes that trial courts have the power to set aside

stipulations entered into advertently or for justifiable cause. *Dove v. Cude*, 710 P.2d 170 (Utah 1985). Furthermore, mistakes of fact have specifically been found to be a valid ground for setting aside stipulations in appropriate circumstances. *State v. Velasquez*, 672 P.2d 1254 (Utah 1983).


In this case, West Valley City asserts that the trial court judge abused his discretion by failing to set aside the erroneous stipulation of the parties, thereby allowing inaccurate evidence to be presented to the jury. It is now the erroneous stipulation and the inaccurate photographs that form the basis for Sweazey's "inadequacy of the evidence" argument on appeal. West Valley City believes the trial court's decision to be harmless error and that the jury verdicts were adequately supported by other competent evidence, but the City urges this Court to examine the trial court's ruling in its decision in this case.

CONCLUSION

Based on the foregoing, the City respectfully requests that Sweazey's appeal be denied, and that her convictions be affirmed.

DATED this 5th day of February, 1998.

WEST VALLEY CITY



J. Richard Catten, Senior Attorney
Attorney for Plaintiff/Appellee


CERTIFICATE OF SERVICE

I, J. Richard Catten, certify that on the 5th day of February, 1998, I served upon Mark J. Gregersen and L. Bruce Larsen, Attorneys for Defendant/Appellant, two (2) copies each of the Brief of the Appellee, by causing said Briefs to be mailed to them, by first class mail, with sufficient postage prepaid, to the following addresses:

Mark J. Gregersen
P.O. Box 456
Centerville, Utah 84014

L. Bruce Larsen
Larsen & Rammell
3600 Market Street, Suite 100
West Valley City, Utah 84119

WEST VALLEY CITY



J. Richard Catten, Senior Attorney
Attorney for Plaintiff/Appellee

ADDENDUM

DETERMINATIVE STATUTES: UTAH CODE (1995)

DETERMINATIVE ORDINANCES: WEST VALLEY CITY CODE (1995)

DETERMINATIVE STATUTES

UTAH CODE (1995)

10-9-804. Maps and plats required.

(1) Whenever any lands are laid out and platted, the owner of those lands shall cause an accurate map or plat to be made of them that sets forth and describes:

(a) all the parcels of ground laid out and platted, by their boundaries, course, and extent, and whether they are intended for streets or other public uses, together with any areas that are reserved for public purposes; and

(b) all blocks and lots intended for sale, by numbers, and their precise length and width.

(2) (a) The owner of the land shall acknowledge the map or plat before an officer authorized by law to take the acknowledgement of conveyances of real estate.

(b) The surveyor making the map or plat shall certify it.

(c) The legislative body shall approve the map or plat as provided in this part.

(3) After the map or plat has been acknowledged, certified, and approved, the owner of the land shall file and record it in the county recorder's office in the county in which the lands platted and laid out are situated.

DETERMINATIVE ORDINANCES

WEST VALLEY CITY CODE (1995)

7-1-103. DEFINITIONS.

Whenever any words or phrases used in this Title are not defined herein, but are defined in related sections of the Utah Code or in the Subdivision Ordinance, such definitions are incorporated herein and shall apply as though set forth herein in full, unless the context clearly indicates a contrary intention. Words not defined in any Code shall have their ordinarily accepted meanings within the context in which they are used.

Unless a contrary intention clearly appears, words used in the present tense include the future, the singular includes the plural, the term "shall" is always mandatory, and the term "may" is permissive. The following terms as used in this Title shall have the respective meanings hereinafter set forth.

...

(119) "Official Map" means the public street map adopted by the City Council as provided in Title 10, Chapter 9, Sections 23 through 25, Utah Code Annotated 1953, as amended.

....

7-2-113. MEASUREMENT OF SETBACK.

Wherever a front yard is required for a lot facing on a street for which an official map has been recorded in the office of the County Recorder, the depth of such front yard shall be measured from the mapped street line provided by the official map. Where an official map has not been recorded, measurements shall be made from the existing right-of-way line or from the proposed right-of-way line, as indicated on the major street plan.

7-2-117. FENCES.

(1) A six-foot fence of any material may be constructed on or within property lines, as shown on the official plats maintained in the Office of the Salt Lake County Recorder, in side and rear yards. This shall include side yards of corner lots, provided clear view of intersections can be maintained as outlined in Section 7-2-111.

(2) In front yards, a 20-foot setback from the front property line shall be maintained for fences over four feet in height. Fences four feet or less in height, which are at least 50 percent transparent, may be allowed up to the front property line or, if sidewalk exists, up to the sidewalk. No solid fence over two feet in height shall be allowed closer than 20 feet to the front property line.

(3) Fence Height. Where there is a difference in the grade of the properties on either side of a fence or wall, the height of the fence or wall shall be measured from the average grade of the higher property. Average grade shall be established based on elevations of finish grade within 5 feet of the proposed fence line. When a retaining wall exists at the property line, fence height may be measured from the higher side of the wall.

(4) Fire Hydrants. When a fire hydrant is located on or near a property line, it shall be given a clear buffer area around the hydrant of at least three feet in order to promote easy access to the plug for fire protection. A fire hydrant shall not be enclosed by fencing.

(5) When requested, the Zoning Administrator may grant a waiver or modification of any height requirements of this section upon finding that the waiver or modification will not circumvent the intent of the requirements. Any person may appeal the Zoning Administrator's decision pursuant to Section 7-18-104. If the Zoning Administrator so desires, he may submit the request for a waiver or modification directly to the Board of Adjustment for their determination.

7-6-303. PERMITTED USES.

The following are permitted uses in all single-family residential zones; no other permitted uses are allowed, except as provided in Section 7-2-114:

- (1) Agriculture
- (2) Community Uses
- (3) Home occupations - Minor
- (4) Household pets
- (5) Signs (see Title 11 - Sign Ordinance)
- (6) Single-family dwellings
- (7) Uses customarily accessory to listed permitted uses

7-6-305. MINIMUM LOT AND SETBACK REQUIREMENTS.

(1) The following shall be the minimum lot areas, widths and setbacks in single-family residential zones:

<u>Zone</u>	<u>Lot Area</u>	<u>Lot Width</u>	<u>F</u>	<u>S</u>	<u>S</u>	<u>DG/C Side</u>	<u>SG/C Side</u>	<u>R</u>
R-1-4	4,000 S.F.	50'	25'	0'	30'	10'	20'	20'
R-1-6	6,000 S.F.	65'	25'	6'	30'	10'	20'	30'
R-1-7	7,000 S.F.	70'	25'	8'	30'	10'	20'	30'
R-1-8	8,000 S.F.	80'	25'	8'	30'	10'	20'	30'
R-1-10	10,000 S.F.	90'	30'	8'	30'	10'	20'	30'

F = Front

R = Rear

S = Side

DG/C = Double Garage/Carport

SG/C = Single Garage/Carport

(2) For lots with an attached double-car garage or double carport, the side yard adjacent to the double-car garage or double carport can be reduced to 10 feet. For lots with an attached single-car garage or single carport, the side yard adjacent to the single-car garage or single carport can be reduced to 20 feet. The rear yard may be reduced to a minimum of 20 feet.

(3) For homes existing as of the effective date of this ordinance, April 18, 1990, the side yard setback adjacent to a one-story double-car garage, at least 18 feet wide, may be reduced to a minimum of four feet provided the maximum width of the garage is 20 feet and the four-foot side

yard is hard surfaced. The garage shall continually function as a storage area for vehicles and cannot be converted to living space for a dwelling.

(4) The width of lots on cul-de-sacs shall be measured at the front setback line. Such widths may be reduced a maximum of five feet from widths listed above.

(5) The width of corner lots shall be increased by 10 feet from the minimum width listed above. The minimum side yard abutting a public or private street shall be 20 feet.

(6) Accessory buildings may be located in the rear yard to within one foot of the side and rear property lines, provided the building is at least six feet to the rear of the dwelling, does not encroach on any recorded easements, and occupies no more than 25 percent of the rear yard, and is located no closer than 10 feet to a dwelling on an adjacent lot. On double frontage lots or corner lots, accessory buildings shall not be allowed within 20 feet of any dedicated street.

24-2-111. ACCUMULATION OF SOLID WASTE AND LITTERING.

(1) Accumulation of solid waste and littering prohibited. It shall be unlawful for any person to accumulate, throw, discard, deposit, place, sweep, dump, conduct or allow any person to accumulate, throw, discard, deposit, place, sweep, dump or conduct any solid waste or litter into or upon any public place, private premises, street, road, alley, property abutting any alley, stream, well, spring, canal, ditch, gutter, lot or any other property or place, above or below ground level, except:

- (a) This section shall not apply to waste thrown, deposited or placed in containers meeting the requirements of these regulations and provided for the person's use, or a facility or site approved by the Department.
- (b) This section shall not apply to Department-approved spreading of manure or other materials upon the land for fertilizing or conditioning the soil, provided a nuisance or health hazard is not created.
- (c) This section does not preclude solid waste from being temporarily accumulated for immediate removal, if approved by the Department.
- (d) This section does not preclude the construction or operation of a compost pile, as provided in (5) of this Section.
- (e) This section does not apply to junk and scrap metal accumulated on the premises of a business enterprise lawfully situated and licensed for the same, if a nuisance or health hazard is not created. (11.1)

(2) Abandoned, junked, or inoperable vehicles.

- (a) It shall be unlawful for any person to abandon a vehicle upon any highway or public or private property without the express or implied consent of the owner or person in lawful possession or control of the property. For the purpose of this section, a vehicle shall be presumed to be abandoned if it is left unattended on a highway for a period in excess of 24 hours, or on any public or private property for a period in excess of seven calendar days without the express or implied consent of the owner or person in lawful possession or control of the property.
- (b) It shall be unlawful for any person to cause or permit any scrap metal, dismantled, junk, wrecked, abandoned, or inoperable vehicle(s) or vehicle parts to remain on any property or premises, unless in connection with a lawfully situated and licensed business, or in an enclosed accessory structure, such as a garage or barn, provided such building does not impose a threat to

life safety or a nuisance or health hazard and is constructed in accordance with all municipal ordinances and state building code and zoning regulations at the time of the original building construction. Carports are not considered "enclosed" for the purpose of this ordinance.

- (c) Any abandoned or inoperable vehicle(s) on a person's private property and not owned by him may be removed upon the property owner's request, provided proper Departmental authorization has been granted the wrecker. (11.2)

(3) Cleaning required for vacated premises. Any person vacating a dwelling, storeroom, or any other structure or the immediate grounds shall remove all garbage, trash and refuse and leave the property in a sanitary condition within 24 hours after vacating. (11.3)

(4) Removal of dead animals. It shall be unlawful for any person to knowingly permit any dead animal to remain upon the premises, or for the owner of any dead animal to knowingly permit it to remain upon any public street or property or private premises. If the owner of the dead animal does not remove and properly dispose of it himself or cause it to be properly removed and properly disposed within 24 hours after receipt of notice from the Department, the Department may cause it to be removed and disposed and shall assess against the owner the actual costs of removal and disposal. The Department may avail itself of all remedies in law to enforce removal, disposal and recovery of cost. If ownership of the dead animal cannot be determined, the owner of the property on which the dead animal is located shall be responsible for proper removal and disposal of the animal, and the assessing and recovering of costs shall apply to the property owner. (11.4)

(5) Compost. A person may keep or maintain compost on his property for home gardening if the following requirements are complied with:

- (a) The compost shall be located and maintained to prevent the spread of disease, the propagation or harborage of insects or rodents, the creation of any odor or nuisance, or any other condition that might affect the public health, safety or welfare.
- (b) The compost shall not be used or sold as a commercial product or used in any licensed business operation unless the requirements of approval, permits, and operation given in Sections 24-2-109 and 24-2-114 of these regulations are complied with. (11.5)

(6) Handbills and leaflets. Every person distributing commercial handbills, leaflets, flyers, advertising or information material shall prevent these materials from littering public or private property. (11.6)

(7) Containers provided to prevent litter. To facilitate proper disposal of litter by pedestrians and motorists, public establishments and institutions shall provide adequate containers that are emptied and maintained in good condition and meet the prescribed standards in these regulations. The requirements shall be applicable, but not limited to, fast-food outlets, shopping centers, convenience stores, supermarkets, service stations, commercial parking lots, mobile canteens, motels, hospitals, schools and colleges. (11.7)

(8) Construction and demolition projects.

- (a) It shall be unlawful for the owner, agent or contractor in charge of any construction or demolition project to cause, maintain, permit or allow to be caused, maintained or permitted the accumulation of any litter on the site before, during or after completion of the construction or demolition project.

- (b) It shall be the duty of the owner, agent or contractor to have on the site adequate containers for the disposal of litter and to make appropriate arrangements for its collection or final disposition at an authorized facility.
- (c) It shall be unlawful for the owner, agent, or contractor in charge of any construction or demolition project to place, for City-furnished bulky waste collection, waste from construction and demolition projects.
- (d) The owner, agent or contractor may be required by the Department to show proof of appropriate collection, or if personally transported, of final disposition at an authorized facility. (11.8)

(9) Loading and unloading operations.

- (a) Any owner or occupant of an establishment or institution where litter is attendant to the packing or unpacking or loading or unloading of materials at exterior locations shall provide suitable containers for the disposal and storage of such litter.
- (b) It shall be the duty of such owner or occupant to remove at the end of each working day any litter that has not been containerized at exterior locations. (11.9)

(10) Keeping property clean.

- (a) It shall be the duty of the owner or occupant to keep property free of litter. This requirement applies not only to removal of loose litter, but to materials that are or become trapped at fence and wall bases, grassy and planted areas, borders, embankments or other lodging points.
- (b) The owner or occupant whose property faces on municipal sidewalks, strips between streets and sidewalks, or strips between such properties and streets shall be responsible for keeping those sidewalks and strips free of litter.
- (c) It shall be unlawful to sweep or push litter from sidewalks and steps into streets. Sidewalk and step sweepings shall be picked up and put into household or commercial solid waste containers. (11.10)

24-8-105. REAL PROPERTY TO BE KEPT CLEAN AND SECURED.

It shall be unlawful for any person owning or occupying real property within West Valley City, after receiving written notice from the Department to fail:

- (1) To maintain the height of weeds on the property, including adjacent parking strip(s), alley(s) and street edge(s) as required in Section 24-8-106. (5.1)
- (2) To remove from the property and lawfully dispose of all cuttings from weeds or solid waste. (5.2)
- (3) To effectively secure any vacant structure. (5.3)
- (4) To maintain or repair any unsightly or deleterious objects or structures, as defined in this Chapter. (5.4)
- (5) To remove from the property and lawfully dispose of any unsightly or deleterious objects or structures. (5.5)
- (6) To remove or obliterate any graffiti from or on any structure located upon any real property within the City, when the graffiti is visible from the street or other public or private property.