

1987

# Utah v. Rudy Ringo Duran : Brief of Respondent

Utah Court of Appeals

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**BRIEF**

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IN THE UTAH COURT OF APPEALS

DOCKET NO.

**870531-CA**

STATE OF UTAH

Plaintiff-Respondent

vs.

RUDY RINGO DURAN,

Defendant-Appellant.

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Case No. 870531-CA

**BRIEF OF RESPONDENT**

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APPEAL FROM A CONVICTION OF ASSAULT BY A  
PRISONER, A THIRD DEGREE FELONY, IN VIOLATION  
OF UTAH CODE ANN. § 76-5-102.5 (1978), IN THE  
THIRD DISTRICT COURT, IN AND FOR SALT LAKE  
COUNTY, STATE OF UTAH, THE HONORABLE RAYMOND  
S. UNO, JUDGE, PRESIDING.

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IN THE UTAH COURT OF APPEALS

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 Plaintiff-Respondent : Case No. 870531-CA  
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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, :  
Plaintiff-Respondent, : Case No. 870531-CA  
v. :  
RUDY RINGO DURAN, :  
Defendant-Appellant. :

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BRIEF OF RESPONDENT

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JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a conviction of Assault by a Prisoner, a third degree felony, in violation of Utah Code Ann. § 76-5-102.5 (1978), in the Third Judicial District Court. This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(f)(Supp. 1988).

STATEMENT OF THE ISSUES PRESENTED ON APPEAL

1. Whether the evidence was sufficient to support the jury's guilty verdict which rejected defendant's claim of defense of self and habitation?
2. Whether the trial court properly refused to reduce the felony charge to a misdemeanor where two statutes proscribed the same conduct but provided different penalties and the statutes were not duplicative as to their elements?

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Utah Code Ann. § 76-5-102.4 (1978).

**Assault by a Prisoner** -- Any prisoner who commits assault by intending to cause bodily injury, is guilty of a felony of the third degree.

Utah Code Ann. § 76-5-102.5 (1978).

**Assault Against Peace Officer on Duty - Any person who assaults a peace officer, with knowledge he is on duty, is guilty of a Class 'A' Misdemeanor.**

STATEMENT OF THE CASE

Defendant, Rudy Ringo Duran, was charged with Assault by a Prisoner, a third degree felony, in violation of Utah Code Ann. § 76-5-102.5 (1978). Defendant was convicted as charged after a jury trial held September 29 1987, through October 2, 1987, in the Third District Court, in and for Salt Lake County, the Honorable Raymond S. Uno, Judge, presiding. Defendant was sentenced by Judge Uno on November 2, 1987, to a term of zero to five years in the Utah State Prison to be served consecutively with Defendant's previous convictions.

STATEMENT OF THE FACTS

On the day of the assault, October 29, 1986, defendant was an inmate at the Utah State Prison housed at cell-block "A" #320 (T. 236, 304). On the previous day, while defendant was locked in his cell, inmate John Neely assaulted Officer Norman Carpenter (T. 234, 332). Defendant participated in the commotion and excrement was found directly in front of his cell (T. 335, 341).

After inmate Neely was transferred to maximum security, Officers Carpenter and Swanti patrolled "A" block to quiet the inmates (T. 33). During this patrol, Officer Carpenter learned that defendant had verbally threatened another inmate (T. 242). Officer Carpenter wrote a report describing defendant's behavior during the Neely assault and the verbal threat (T. 242).



Defendant was informed of the report and warned of the possibility of being sent to maximum security for management purposes (T. 243).

The next day, Lieutenant Walter Yankovich, reviewed three separate reports written by Officers Carpenter, Swanti and another officer concerning the defendant (T. 127-28). The reports indicated that defendant had attempted to incite other inmates to assault Officer Carpenter by yelling, screaming, throwing excrement, and verbally threatening another inmate (T. 105, 241-42).

To verify the reports, Lieutenant Yankovich talked to Officer Swanti, who was on the shift with Officer Carpenter the night of the Neely assault, and with Kevin Ritchens, an inmate who was the lead of block "A" (T. 124-25). Lieutenant Yankovich then conferred by telephone with his superior, Captain Johnson (T. 105). Together they determined that defendant should be transferred to maximum security (T. 106).

Lieutenant Yankovich summoned Officers Olin and Uriate to assist in transferring defendant to maximum security (T. 106). Once at the cell, Lieutenant Yankovich instructed defendant to dress and prepare to be transferred to maximum security (T. 106). Defendant was informed he was being moved for management control reasons (T. 106, 166, 181).

As Defendant finished dressing, he was instructed to turn around and back up to the cell door to be handcuffed (T. 107, 166, 178, 182). Prison policy requires all prisoners to be handcuffed while being transferred to a more restrictive facility (T. 107, 180).

Defendant flatly refused to be handcuffed and informed the officers that, "I'm not going to max." (T. 178, 180, 189). Lieutenant Yankovich repeated the instruction that defendant turn around to be handcuffed (T. 107, 166). Defendant defiantly refused to follow the order and continued to stand in the center of the cell with his arms folded across his chest (T. 108).

The officers then entered the cell and again instructed defendant to turn around to be handcuffed (T. 166, 178, 182). Defendant responded by assuming a combative stance in dropping his arms to his side and spreading his legs slightly apart (T. 108, 140, 166, 183).

As Lieutenant Yankovich turned away from defendant to get a pair of handcuffs from Officer Olin who was slightly behind Yankovich, defendant struck Yankovich in the face (T. 108, 136, 167, 179, 183). Prior to the assault, Yankovich had neither verbally nor physically threatened defendant (T. 109, 315).

The blow broke Lieutenant Yankovich's nose and blurred his vision momentarily (T. 110, 137). Defendant again attempted to assault the Lieutenant (T. 109, 137). However, three officers were able to subdue defendant as he continued to resist (T. 109, 167, 183). Defendant was then handcuffed and transferred to maximum security (T. 109). Defendant continued to struggle against the officers en route to maximum security (T. 167, 168).

Lieutenant Yankovich's injury was treated at the Utah State Prison Hospital (T. 100). The injury was diagnosed as a large fracture to the nose (T. 110). Lieutenant Yankovich received subsequent medical attention for a sore throat as a result of blood flowing down his throat (T. 110).

### SUMMARY OF THE ARGUMENT

Sufficient evidence existed to support a conviction for Assault by a Prisoner based upon the undisputed evidence that defendant struck the prison guard without provocation. Defendant's claim that he was being improperly transferred cannot be considered a justification to commit a criminal assault. While defendant is not precluded from asserting a civil rights violation for an improper prison transfer, this criminal appeal is not the proper avenue. The jury could have reasonably discounted defendant's self-defense claim because: (1) defendant's argument that a procedural violation licenses a right to use force is erroneous; (2) defendant was the aggressor; or, (3) in light of the circumstances, it was not reasonable for defendant to believe he was in imminent danger of bodily harm.

The trial Court properly denied defendant's motion to reduce the felony conviction to a misdemeanor charge where the two statutes in question are not duplicative as to their elements.

### ARGUMENT

#### POINT I

THE EVIDENCE WAS SUFFICIENT TO SUPPORT A  
CONVICTION OF ASSAULT BY A PRISONER.

A. An Improper Prison Transfer Procedure Is  
Not A Justification For Criminal Assault.

On appeal, defendant contends that he had a complete defense to the assault charge. He bases his claim on the unique argument that he was justified in assaulting the prison guard because the transfer to maximum security without a pre-transfer

hearing violated his federal and state due process rights. Defendant's claim should be rejected because he improperly asserts that an alleged civil due process violation is a legal justification to commit a criminally violent act.

The central issue in this appeal is whether a criminal assault occurred, and not, as defendant asserts, whether there was an administrative procedural violation by prison authorities. A review of the record demonstrates that there was sufficient evidence to support a conviction of Assault by a Prisoner.

In reviewing a claim of insufficient evidence to support a jury verdict, it is well established that:

It is the exclusive function of the jury to weigh the evidence and to determine the credibility of the witnesses, and it is not within the prerogative of this Court to substitute its judgment for that of the fact-finder. This Court should only interfere when the evidence is so lacking and insubstantial that reasonable men could not possibly have reached a verdict beyond a reasonable doubt.

State v. Lamm, 606 P.2d 229, 231 (Utah 1980) (footnote omitted). See also State v. Logan, 563 P.2d 811 (Utah 1977); State v. Asay, 631 P.2d 861 (Utah 1981); State v. Romero, 554 P.2d 216 (Utah 1976); State v. Granato, 610 P.2d 1290 (Utah 1980); State v. Fort, 572 P.2d 1387 (Utah 1977); State v. Wilson, 565 P.2d 66 (Utah 1977); and State v. Erickson, 568 P.2d 750 (Utah 1977). Moreover, "evidence is to be viewed in light most favorable to the jury's verdict." State v. Gorlick, 605 P.2d 761 (Utah 1979).

In the case at bar, an examination of all the evidence supports the conclusion that there was substantial evidence upon which the trier of fact could have found defendant guilty of

assault. It is undisputed that defendant struck Officer Yankovich breaking the Officer's nose (T. 108, 307). The violent act was unjustified as Officer Yankovich had made no verbal or physical threats toward defendant (T. 109, 315). In fact, Officer Yankovich had turned away from defendant when defendant struck him (T. 108, 179). In viewing the evidence in the light most favorable to the jury's verdict, and keeping in mind that in a jury trial it is the jury's exclusive function to weigh the evidence and determine the witnesses' credibility, sufficient evidence existed to support a conviction of Assault by a Prisoner.

Defendant attempts to divert the Court's attention from the criminal assault to an alleged procedural violation by prison authorities. It is the State's position that if defendant has a meritorious civil claim, defendant is not precluded from bringing such an action against prison authorities. However, this criminal appeal is not the proper avenue. Thus, this Court should not review defendant's civil due process claim.

A similar due process claim was asserted by prison inmates in a civil rights action in Lavine v. Wright, 423 F. Supp. 357 (D. Utah 1976). In Lavine, Utah State Prison inmates brought a civil action against prison administrators challenging the exact Administrative Segregation Procedures asserted in this case. See also Meachum v. Fano, 427 U.S. 215 (1976); Montayne v. Haymes, 427 U.S. 236 (1976). Defendant likewise had the legal remedy of filing a civil rights action rather than resorting to violence.

Additionally, defendant had the option to pursue a civil claim through the prison Inmate Grievance Procedure (T. 317). In fact, defendant took advantage of the grievance procedure by filing a grievance against Officer Yankovich for transferring him to maximum security (T. 319). It is significant to note that the alleged procedural violation was subsequently dismissed by the proper prison authorities (T. 320).

In sum, defendant had civil remedies available to address any alleged civil rights violation resulting from the prison transfer. However, defendant's violent method of self-help cannot be justified as a lawful remedy to alleged due process violations.

**B. The Jury Could Have Properly Rejected Defendant's Claim Of Defense Of Self And Habitation.**

Defendant asserts that the jury's rejection of the defenses of self-defense and habitation were erroneous and unsupportable. He argues that since the guards used greater force than was necessary to accomplish an unlawful transfer, he had the right to assault the prison guard to protect himself and his habitation.

The central issue is whether under the facts of this case defendant could properly invoke the affirmative defense of self-defense. Self-Defense is defined in Utah Code Ann. § 76-2-402 (1978) as follows:

**Force in defense of person--Forcible felony defined.--(1) A person is justified in threatening or using force against another when and to the extent that he reasonably believes that such force is necessary to defend himself or a third person against such**

other's imminent use of unlawful force; however, a person is justified in using force which is intended or likely to cause death or serious bodily injury only if he reasonably believes that the force is necessary to prevent death or serious bodily injury to himself or a third person, or to prevent the commission of a forcibly felony.

(2) A person is not justified in using force under the circumstances specified in paragraph (1) of this section if he:

(a) Initially provokes the use of force against himself with the intent to use force as an excuse to inflict bodily harm upon the assailant; or

(b) Is attempting to commit, committing, or fleeing after the commission or attempted commission of a felony; or

(c) Was the aggressor or was engaged in a combat by agreement, unless he withdraws from the encounter and effectively communicates to such other person his intent to do so and the other notwithstanding continues or threatens to continue the use of unlawful force.

(emphasis added).

Applying this statute, the jury had a number of grounds upon which it could properly have rejected defendant's claim of self-defense. Among other things, the jury could reasonably have found that: (1) defendant was not justified in using force to protect a constitutional right; (2) defendant was the aggressor; or, (3) it was not reasonable for defendant to believe it was necessary to use force to defend himself.

Defendant's claim that an administrative due process violation is somehow a defense to an assault is completely erroneous and without legal foundation. Such a violation does not justify assaultive behavior. In State v. Wick, 331 N.W.2d 769 (Minn. 1983), the Minnesota Supreme Court rejected the argument that assaultive behavior is justified to protect a constitutional right and upheld a conviction of assault. The

defendant in Wick had assaulted a police officer because the officer's search was more broad than defendant deemed necessary. As to a defendant's rights in the face of a constitutional violation, the Court stated that:

"while a defendant would have a right to resist an officer in order to defend himself or another against unjustified bodily attack, assaultive conduct is not justified solely on the ground that the officers are violating the defendant's fourth amendment rights or on the ground that the defendant believes that the officers are violating his rights."

Id. at 771

The Illinois Appellate Court in People v. Taylor, 112 Ill. App. 3d 3, 67 Ill. Dec. 677, 444 N.E.2d 1151 (1983) also held assaultive behavior to be unjustified to preserve a constitutional right. In Taylor, the defendant contended that he struck the officer because the officer was interfering with the defendant's First Amendment right to free speech. The Court rejected this argument and found that a violation of a constitutional right "did not constitute a defense to the charge of battery." Id. at 1152.

In the case at bar, defendant attempts to hide his assaultive behavior behind the protective cloak of the Constitution. Defendant alleges that in assaulting the officer, he was seeking to preserve the right to a pre-transfer hearing. If this Court adopted defendant's reasoning, then chaos would result as assaultive behavior would be a judicially condoned method of remedying any alleged administrative procedural violation.



Moreover, at trial, defendant testified that he was willing to go to maximum security as long as he was not handcuffed during the transfer (T. 307, 311-12, 314, 319). Prison policy provides that all prisoners being transferred within the prison be handcuffed during transfer (T. 107, 180). Defendant testified that he was aware of the prison policy having been handcuffed during previous transfers (T. 316).

In an attempt to comply with prison policy, Officer Yankovich repeatedly instructed defendant to turn around to be handcuffed (T. 166, 171, 314). Defendant verbally denounced the order by telling the guards "that I refuse to be handcuffed." (T. 314). As Officer Yankovich turned away from defendant to get the handcuffs from another officer, defendant physically denounced the order by striking Officer Yankovich (T. 108, 136, 167, 174, 183). There was no discussion about a constitutional right to a hearing, only a violent refusal on defendant's part to follow prison policy (T. 108, 189). Defendant refused to be handcuffed, so he struck the officer.

To accept defendant's claim is to permit violence as a remedy for any perceived due process violation. Defendant is bankrupt for legal support justifying violence as a due process remedy. Therefore, this Court should find that the legality of the transfer is not relevant to the assault charge.

Defendant attempts to support his self-defense claim by analogizing the alleged unlawful transfer to be an unlawful arrest. He argues that since Utah Code Ann. § 76-8-305 (Supp. 1988) infers a privilege to resist an unlawful arrest, defendant

had the right to resist the unlawful transfer. While some states do allow a person to resist an illegal arrest, this is a limited privilege and courts refuse to condone assaultive behavior as a reasonable means of resisting an illegal arrest.

For example, the Mississippi Supreme Court in Watkins v. State, 350 So.2d 1384 (Miss. 1977) upheld a conviction of aggravated assault on a police officer. The Court determined that even though the arrest violated the Fourth Amendment rights of the defendant because it lacked probable cause, the existence of the limited privilege to resist arrest did not authorize the defendant to commit an assault. The Mississippi Court reasoned that "there is no judicial way that [defendant's] resistance can be classified as privileged or condoned by a court in modern society . . . Moreover, there would have been available to him the legal processes of the courts for vindicating his illegal arrest if indeed it was such." Id. at 1387.

In State v. Harrell, 67 N.C. App. 57, 312 S.E.2d 230 (1984), the North Carolina Court of Appeals recognized the right to reasonably resist an illegal arrest, but upheld a conviction for an assault on a police officer. The Court stated that "even if defendant had been illegally restrained under the fourth amendment, he had the right to use only such force as reasonably appeared necessary to prevent the unlawful restraint of his liberty." Id., at 235. In upholding the conviction, the court interpreted defendant's act of striking the officer in the face as an unnecessary show of force that fell outside of the limited privilege of resisting an unlawful arrest. Id.

The Utah Supreme Court in State v. Bradshaw, 541 P.2d 800 (Utah 1975) condoned an arrestee's degree of resistance in an illegal arrest. In Bradshaw, the defendant "offered no interference whatever except to touch his fellow townsman, an officer, and actually walked away from . . . the officer . . ." Id., at 803 (Henriod, Chief Justice, concurring). While the Utah Supreme Court has not completely addressed what constitutes reasonable behavior in resisting an illegal arrest, surely "an arrestee is never justified in assaulting an arresting officer unless the officer assaulted him first." Brooks v. State, 144 Ga. App. 97, 240 S.E.2d 593 (1977).

In the case at bar, it is undisputed that defendant assaulted the prison guard without provocation (R. 108-09, 307, 315). Such unprovoked violent behavior cannot be judicially condoned as falling within the limited privilege of resisting an illegal arrest. Further, the prison transfer should not be considered an "arrest" where defendant had been committed to the custody of the Department of Corrections and was simply being transferred to a more restrictive environment.

In any event, the jury was instructed regarding defendant's self-defense theory (R. 111-12, 114-19; Jury Instruction No.'s 22, 23, 25, 26, 27, 28, 29, and 30.) They were instructed that "if such evidence of self-defense when considered in connection with all other evidence in this case raises a reasonable doubt as to the defendant's guilt or if it raises reason to believe that the defendant acted in self-defense, you must find him not guilty." (R. 119; Jury Instruction No. 30).

Upon deliberation, the jury rejected defendant's self-defense claim and issued a verdict of guilty as charged (R. 165; Verdict). On appeal, this Court will not disturb a jury's verdict unless the evidence is so "insubstantial or lacking that reasonable individuals could not have reached a guilty verdict beyond a reasonable doubt." State v. Warenski, No. 880293-CA, slip op. at 2 (Utah Ct. App. December 19, 1988)(Per Curiam Memorandum Decision Not for Publication)(citations omitted). In light of the undisputed evidence that defendant was the aggressor not the defender, the jury could have reasonably rejected defendant's theory of defense of self and habitation.

In State v. Starks, 627 P.2d 88 (Utah 1981), the Utah Supreme Court upheld a jury instruction which specified "that self-defense is not a justification when the defendant is the aggressor." Id., at 90. In reaching this decision, the Court reasoned that "if the defendant were found to be the aggressor he could not rely on the defense of self-defense. Id. at 91. See also State v. Robinson, 40 N.C. App. 514, 253 S.E.2d 311 (1979).

Under a similar analysis, the Maine Supreme Court in State v. Millet, 273 A.2d 504 (Me. 1971) determined that because the accused was the aggressor, the accused was not entitled to any self-defense instructions.

"We are satisfied that in a day of increasing resort to violence these are salutary rules indeed. The law of self-defense is designed to afford protection to one who is beset by an aggressor and confronted by a necessity not of his own making. It must not be so perverted as to justify [an assault] which occurs in the course of a dispute provoked by the defendant at a time when he knows or ought reasonably

to know that the encounter will result in . . .  
. combat . . . The law cannot give sanction  
to the settling of disputes by the use of  
[force]."

Id. at 510.

In the case at bar, the theory of self-defense is not appropriate where defendant initiated the violence. Therefore, he cannot now claim that his actions were in self-defense. As the Oklahoma Supreme Court said, "[o]ne who seeks and brings on an affray cannot shield himself under the plea of self-defense." Jenkins v. State, 161 P.2d 90, 96 (Okla. 1945). See also People v. Schliesser, 671 P.2d 993 (Colo. App. 1983).

Defendant asserts that while he may have been the aggressor, it was reasonable for him to believe that he needed to defend himself by force against the unlawful force of the prison guards. He argues that although the prison guards did not verbally or physically threaten him, the mere presence of three guards in his cell constituted a greater force than necessary to transfer a prisoner (T. 315, 318). Thus, defendant interpreted their presence as a threat "that they were going to assault me." (T. 308, 318-19). Defendant's claim should be dismissed because his subjective fears without more is not enough to support a claim of self-defense.

The test for self-defense is both subjective and objective: the individual must believe that he is in imminent danger and such a belief must be reasonable. "A subjective fear does not by itself entitle the defendant to use self-defense." Tatman v. Cordingly, 672 P.2d 1286, 1290 (Wyo. 1983). According to Prosser:

"The privilege to act in self-defense arises, not only where there is a real danger, but also where there is a reasonable belief that it exists.

The belief must, however, be one which a reasonable man would have entertained under the circumstances . . . [I]t is not enough that he really believes that he is about to be attacked, unless he has some reasonable ground for the belief . . ."

Prosser, Torts, § 19 p. 109 (4th ed. 1971).

In applying this objective standard, the Utah Supreme Court in State v. Maestas, 564 P.2d 1386 (Utah 1977) affirmed a conviction of an assault by a prisoner. In Maestas, the defendant's self-defense claim was based on the idea that the prison environment made defendant more fearful of his personal safety, having been stabbed in a previous prison brawl. Id. at 1387. In upholding the conviction, the Court discounted defendant's subjective fears because there was no reasonable substantial evidence to support defendant's self-defense theory. See also Bennett v. Brandrud Manufacturing Co., 1 Wash. App. 183, 459 P.2d 977 (1969).

In a case almost identical to the case at bar, the Utah Supreme Court in State v. Dock, 585 P.2d 56 (Utah 1978) refused to reverse a conviction of assault by a prisoner. In this case, as two prison guards entered the defendant's cell to transport him to maximum security, the defendant assaulted one of the guards. The defendant based his self-defense claim on the idea that "he was afraid when the guards came to transfer him to maximum security." Id. at 57. The Utah Supreme Court rejected defendant's fears as unreasonable under the circumstances as "no evidence was presented showing the entrance into the defendant's cell was unlawful or violent." Id.

Likewise, in the case at bar, no evidence was presented showing the entrance into defendant's cell was unlawful or violent. In fact, the guards only entered the cell after defendant repeatedly refused to back up to the jail bars and be handcuffed as instructed (T. 166, 178). The basis of defendant's fear was that the mere presence of three guards in his cell presented a threat that he would be beaten (T. 315, 318-19). Defendant's fear was completely subjective and not objectively reasonable in view of the lack of aggression on the part of the guards. Since, defendant's subjective fear without more is not enough to support a claim of self-defense, the jury could have properly discounted defendant's self-defense claim.

Defendant argues that his fear was reasonable because on the day prior to the assault Officer Carpenter threatened to send defendant to maximum security (T. 243). However, since Carpenter's threat to send defendant to maximum security was not accompanied by any threat of violence to defendant, it was not reasonable for defendant to believe he was in imminent harm when the prison guards attempted to transfer him to maximum security.

The jury also properly rejected defendant's claim of defense of habitation. The United States Supreme Court held in Hudson v. Palmer, 468 U.S. 517 (1984) that a prisoner has "no expectation of privacy" in his cell. Id. at 526. Because defendant had no privacy interest in his cell, his habitation defense is meritless.

## POINT II

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO REDUCE THE FELONY CHARGE TO A MISDEMEANOR.

Defendant contends that he was unlawfully charged and convicted. He argues that since he could have been charged under two different statutes which proscribe identical conduct, but impose different penalties, the trial court erred when it refused to reduce the felony charge to a misdemeanor.

Defendant was charged and convicted of Assault by a Prisoner, a third degree felony, in violation of Utah Code Ann. § 76-5-102.5 (1978) which provides:

**Assault by a Prisoner --** Any prisoner who commits assault by intending to cause bodily injury, is guilty of a felony of the third degree.

The crime of Assault Against Peace Officer on Duty, a class "A" misdemeanor, is defined as follows:

Any person who assaults a peace officer, with knowledge he is on duty, is guilty of a Class 'A' Misdemeanor.

Utah Code Ann. §76-5-102.4 (1978).

In support of his claim, defendant relies on State v. Shondel, 22 Utah 2d 343, 453 P.2d 146 (1969) in which the Utah Supreme Court held that where two statutes proscribe the same behavior, but impose different penalties, the defendant is entitled to the lesser penalty. However, the application of Shondel is limited to situations where the statutes at issue are "wholly duplicative as to the elements of the crime." State v. Bryan, 709 P.2d 257, 263 (Utah 1985); See also State v. Gomez, 722 P.2d 747, 749 (Utah 1986).



Applying this limited standard, the Utah Supreme Court in State v. Hales, 652 P.2d 1290 (Utah 1982) refused to reduce a felony conviction of Willfully Destroying Public Records by a Custodian. In Hales, the defendant could have been charged under the more general misdemeanor charge of Tampering with Records which applied to "any person." In denying the reduction of the conviction, the court reasoned that while the conduct prohibited might be the same, the statutes were distinct in that they applied to different people. The court found that such a distinction was "manifestly rational" because "[p]ublic officials have greater access to public records and, by virtue of the public trust reposed in them, a higher responsibility to safeguard the interests and property of the public than do other members of the community." Id. at 1293.

In the case at bar, the statutes at issue can be distinguished on the same point. The crime of Assault by a Prisoner applies to "any prisoner" whereas the crime of Assault Against Peace Officer on Duty applies to "any person." Thus, Legislature has determined that the act of a prisoner committing an assault should be punished more severely than an assault committed by other members of the community. Given the dangerous and highly volatile environment of prison life, such a distinction is "manifestly rational." Hales, 652 P.2d at 1293.

Additionally, the victims of the respective crimes are not identical. Assault by a Prisoner applies to violent acts against any person, not just police officers. Accordingly, a prisoner may be charged with Assault by a Prisoner by attacking

another inmate. In contrast, Assault Against Peace Officer on Duty, by its own definition, applies only to attacks on law enforcement individuals, not the public generally.

It is well-established that the Legislature has the authority to determine the degree of punishment for specific crimes. As the Utah Supreme Court stated in State v. Clark, 632 P.2d 841, 843-44 (Utah 1981):

It is not unconstitutional for a state to impose a more severe penalty for a particular type of crime than the penalty which is imposed with respect to the general category of crimes to which the special crime is related or of which it is a subcategory . . .

As long as the legislative classifications are not arbitrary, the fact that conduct may violate both a general and a specific provision of the criminal laws does not render the legislation unconstitutional, even though one violation is subject to a greater sentence.

Id.

The comparative statutes at issue are clearly distinguishable in that they define dissimilar actors and victims. Because of the unique nature of prison life and the need for heightened deterrence, such a distinction cannot be classified as "arbitrary." Therefore, the prosecutor acted within his prosecutorial discretion when he charged defendant with a violation of a statute that "applies more specifically to the [defendant's] offense . . ." Rammell v. Smith, 560 P.2d 1108, 1110 (Utah 1977).

#### CONCLUSION

Based upon the foregoing arguments, respondent respectfully requests this Court to affirm defendant's

RESPECTFULLY submitted this 28<sup>th</sup> day of December,  
1988.

DAVID L. WILKINSON  
Attorney General

A handwritten signature in black ink, appearing to read "Dan R. Larsen", written in a cursive style.

DAN R. LARSEN  
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of  
the foregoing Brief of Respondent were mailed, postage prepaid,  
to Brooke C. Wells, Salt Lake Legal Defender Assoc., 424 East 500  
South, Salt Lake City, Utah 84111, this 28<sup>th</sup> day of December,  
1988.

A handwritten signature in black ink, appearing to read "Dan R. Larsen", written in a cursive style, positioned above a horizontal line.