

1987

Utah v. Duran : Brief of Appellant

Utah Court of Appeals

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David L. Wilkinson; Attorney General; Attorney for Respondent.

Brooke C. Wells; Salt Lake Legal Defender Assoc.; Attorney for Appellant.

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APPEALS
BRIEF

IN THE COURT OF APPEALS OF THE STATE OF UTAH

870531-CA

THE STATE OF UTAH,	:	
	:	
Plaintiff/Respondent,	:	
vs.	:	
	:	
RUDY RINGO DURAN,	:	Case No. 870531-CA
	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLANT

Appeal from a judgment and conviction for Assault by a Prisoner, a third degree felony, in violation of Utah Code Ann. §76-5-102.5 (1953 as amended), in the Third District Court in and for Salt Lake County, State of Utah, the Honorable Raymond S. Uno, Judge, presiding.

BROOKE C. WELLS
Salt Lake Legal Defender Assoc.
424 East Fifth South
Salt Lake City, Utah 84111
Attorney for Appellant

DAVID L. WILKINSON
Attorney General
236 State Capitol
Salt Lake City, Utah 84111
Attorney for Respondent

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BROOKE C. WELLS
Salt Lake Legal Defender Assoc.
424 East Fifth South
Salt Lake City, Utah 84111
Attorney for Appellant

DAVID L. WILKINSON
Attorney General
236 State Capitol
Salt Lake City, Utah 84111
Attorney for Respondent

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JURISDICTIONAL STATEMENT

Jurisdiction is conferred on the Court pursuant to Utah Code Ann. §77-35-26(2)(a) (1953 as amended) and Utah Code Ann. §78-2a-3(2)(f) (1953 as amended) whereby a defendant in a District Court criminal action may take an appeal to the Court of Appeals from a final judgment of conviction for any crime other than a first degree or capital felony. In this case, the Honorable Raymond S. Uno, Judge, Third Judicial District Court in and for Salt Lake County, State of Utah, rendered final judgment and conviction for Assault by a Prisoner, a Third Degree Felony.

STATEMENT OF ISSUES

1. Was the evidence at trial sufficient to establish that Mr. Duran had a complete defense to unlawful actions by prison guards?

2. Did the trial court err in denying Mr. Duran's pre-trial motion to reduce the charge against him to a misdemeanor?

CONSTITUTIONAL PROVISIONS

United States Constitution, 14th Amendment, §1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Utah Constitution, Article 1, §§7, 9

Sec. 7. [Due process of law.]
No person shall be deprived of life, liberty or property, without due process of law.

Sec. 9 [Excessive bail and fines-Cruel punishments.]:

Excessive bail shall not be required; excessive fines shall not be imposed; nor shall cruel and unusual punishments be inflicted. Persons arrested or imprisoned shall not be treated with unnecessary rigor.

IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Respondent,	:	
vs.	:	
RUDY RINGO DURAN,	:	Case No. 870531-CA
Defendant/Appellant.	:	Priority No. 2

STATEMENT OF THE CASE

Appeal from a conviction and judgment for Assault by a Prisoner, a third degree felony, in violation of Utah Code Ann. §76-5-102.5 (1953 as amended) following a jury trial held October 29, 30, 31, and November 1, 1987, in the Third Judicial District Court, in and for Salt Lake County, the Honorable Raymond S. Uno, Judge, presiding.

STATEMENT OF THE FACTS

On October 28, 1986, Rudy R. Duran was an inmate housed at the Utah State Prison, cell-block A, number 320, located on the third tier (T. 236, 304). On October 28, 1986, at approximately 6:45 p.m., a prison guard, Norman Carpenter, conducted a "shakedown" or cell search of the cell occupied by inmate John Neely (T. 228-29, 231). That search was conducted while Neely and nine other inmates were locked out of their second tier cells and locked into the recreation area one tier below (T. 220). Neely objected to the

search being conducted in his absence and climbed a fence to protest Carpenter's actions (T. 219-21, 229-32). At least one of the other nine inmates in the recreation area joined Neely in climbing the fence to the second tier (T. 233), and many of the other inmates on A block shouted and screamed their opinions of the incident (T. 222). Rudy Ringo Duran was not one of the nine inmates locked in the recreation area; he was locked in his own cell on the third tier (T. 236, 304).

The testimony is somewhat conflicting as to what occurred between inmate Neely and guard Carpenter (T. 219-26, 228-35); but for purposes of this appeal, suffice it to say that an altercation ensued which resulted in a pushing exchange between them with Neely being escorted to a holding area and ultimately maximum security (T. 237). Mr. Duran witnessed this altercation between Neely and Carpenter (T. 304).

At 10:32 p.m. - approximately four hours after the exchange with Neely - Officer Carpenter completed a report detailing the incident (T. 240). Mr. Duran was not mentioned in that report (T. 240). An hour later, Officer Carpenter wrote a report charging Mr. Duran with "threat of verbal violence" (T. 240-41). However, Officer Carpenter admitted that he did not personally hear or observe anything to form the basis of that report (T. 241). Officer Carpenter then went to the third tier of A block and advised Mr. Duran that he had written him up and that he personally would insure that Mr. Duran would be next to go to maximum security as a

management problem (T. 242-43). Officer Carpenter recalled his exact words as "if you keep your bullshit up, I'll send your ass to max" (T. 243).

The following morning, October 29, Walter Yakovich, acting lieutenant of A block, arrived at work at 8:00 a.m. (T. 124). Starting at 8:20 a.m., he reviewed the three reports filed on the incident the night before (by Officers Carpenter, Swanti and one other guard); acting Lieutenant Yakovich surmised from the reports that Mr. Duran had attempted to incite other inmates to assault an officer (Carpenter) (T. 124, 105). Mr. Yakovich then spoke with Officer Debra Swanti, who had been on the shift the night before with Officer Carpenter, another officer, and an inmate (T. 124-25). Mr. Yakovich did not speak with Officer Carpenter nor inmate Neely regarding Mr. Duran's involvement, if any, in the previous night's incident (T. 126). Neither did he talk with Mr. Duran (T. 148). At 9:10 a.m., he telephoned his supervisor, Captain Johnson, and together they decided to move Mr. Duran from A block to maximum security (T. 105-06).

Acting Lieutenant Yakovich summoned two other officers, Olin and Uriarte, and went to number 320 A block to move Mr. Duran to maximum security (T. 106). On arriving at Mr. Duran's cell, Acting Lieutenant Yakovich instructed Mr. Duran, "Rudy, get dressed. We are going to max" (T. 131). The three officers then had the cell door opened and stepped inside (T. 132). Mr. Duran, who had been sleeping or lying on the cot in his undershorts, asked

what he had supposedly done wrong; the officers refused to detail any particular violation (T. 131-34). Mr. Duran was told to turn around and be cuffed (T. 133). Officer Uriarte testified that Acting Lieutenant Yakovich told Mr. Duran "that he was being moved, that he would know the charges through the disciplinary system" (T. 178), and that he was being moved "for all the little things and because [he] was a management control problem" (T. 182, 185).

Mr. Duran dressed but expressed a reluctance to go to maximum security; he moved his arms from their previously crossed position, dropped them to his side, and broadened his stance (T. 139, 182-83). The three officers testified that they perceived this action as a combative stance or fighting position (T. 140, 166, 183). Yet, testimony demonstrated that Mr. Duran never threatened them (T. 140, 189), and two officers testified that Mr. Duran even took steps backwards away from the officers to the end of the cell (T. 166, 183). Officer Uriarte additionally testified, by refreshing his recollection with his report, that Mr. Duran repeated, at least twice, "Don't touch me," including once when the three officers were moving in toward him (T. 186-88). At that point, Acting Lieutenant Yakovich reached for a set of handcuffs from Officer Olin, and Mr. Duran swung and punched Acting Lieutenant Yakovich in the nose (T. 188-89).

The punch by Mr. Duran broke Acting Lieutenant Yakovich's nose necessitating a trip to the prison infirmary where a physician's assistant placed a splint in the nose and instructed

Yakovich to put a lot of ice on it and to take some aspirin (T. 161-64). Acting Lieutenant Yakovich testified that the punch had blurred his vision for a few seconds (T. 137), yet he was still able, with the assistance of the other two officers, to force Mr. Duran to the cement floor of the cell and place handcuffs on him (T. 138-89). In the struggle, Mr. Duran's face was pushed into the cement floor with sufficient force to break his dental plate (T. 309, 327).

Once subdued and cuffed, Mr. Duran was taken to maximum security where he was placed in isolation - also known as the hole (T. 310).

At the end of the State's case, Mr. Duran made a motion to dismiss the charge against him asserting that his actions were justified (T. 205). The trial court denied that motion (T. 206).

Mr. Duran testified in his own behalf. He explained that the three guards awakened him from his sleep (T. 306), and that they would not explain what he had done wrong (T. 307). Mr. Duran testified that he had been beaten by guards on a prior occasion after they had placed handcuffs on him (T. 316); and after the Neely incident the night before, and the threats that he would be next, he feared that the three officers were there to assault him (T. 308, 315, 318). He explained his position to the guards and told them he would go to maximum security but requested that they not handcuff him (T. 307).

Mr. Duran admitted refusing to be handcuffed because of his fear of a beating (T. 314). He testified that the presence of three guards at his door, and then in his cell, was a threat because "it only takes one officer to handcuff an inmate" (T. 315). Mr. Duran testified that under different circumstances he would have left the cell in a peaceful manner (T. 311-12).

The defense introduced testimony regarding prison policies and procedures (T. 279-301), and a copy of the Inmate discipline Procedures Manual was presented and accepted into evidence (T. 281, 349, Defendant's Exhibit #8). Mr. Duran alleged that many of the procedures were not properly followed and that others are inadequate to protect his constitutional rights. The State insisted the procedures were both followed and adequately protected Mr. Duran's rights.

The case was then given to the jury who ultimately returned from deliberations with a guilty verdict of Assault by a Prisoner (T. 389).

SUMMARY OF THE ARGUMENT

Mr. Duran had a complete defense to the Assault by a Prisoner charge for which he was convicted.

The prison guards violated Mr. Duran's due process rights, both federal and state, when they unlawfully attempted to move him from 'A' block to maximum security without providing him with a hearing.

Furthermore, no factual basis existed to support the prison guard's decision to move Mr. Duran to maximum security. Mr. Duran had not done anything wrong and was unfairly and arbitrarily selected for the move to maximum security.

Mr. Duran was within his rights to defend himself against the unlawful and unreasonable force used against him by the three officers attempting to move him.

Finally, the pre-trial motion to reduce the charge against Mr. Duran from a felony to a misdemeanor was erroneously denied. Mr. Duran insists that the denial of the motion prejudiced him and requires a reversal of the conviction and a new trial on the lesser charge.

ARGUMENT

POINT I.

SUFFICIENT EVIDENCE EXISTED THAT RUDY RINGO DURAN HAD A COMPLETE DEFENSE TO THE ASSAULT CHARGE.

A. PRISON GUARDS WERE UNJUSTIFIED IN ENTERING
MR. DURAN'S CELL AND ATTEMPTING TO MOVE HIM TO
MAXIMUM SECURITY.

1. The attempt to move Mr. Duran from his unit in A block to the more restrictive maximum security unit was in violation of both federal and state due process protections. Fourteenth Amendment, United State Constitution; Article 1, §7, Utah Constitution. The prison guards characterized Mr. Duran's move to maximum security as a management move (T. 147). This position was purportedly buttressed by testimony explaining that the Inmate Discipline

Procedures segregate major and minor infractions (Exhibit #8 at FD 01/03.01 et. seq.), and also allow for non-punitive isolation or administrative segregation (Id. at FD 01/04.00 et. seq.). These policies, however, were not complied with, and in any event do not support the actions of the prison guards.¹

The United States Supreme Court has mandated that although the rights of prisoners are diminished by certain exigencies of prison life,

[A] prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution the prisons of this country. . . . [Prisoners] may not be deprived of life, liberty, or property without due process of law.

Wolff v. McDonnell, 418 U.S. 539, 555 (1974). Contrary to this declaration, the Utah State Prison and several prison guards at that institution deprived Mr. Duran of his constitutional guarantees of due process.

¹ Various portions of the Inmate Discipline Procedures cited and relied on by the prosecution and state witnesses were either inadequate (FD 01/03.01 et. seq., distinguishes between major and minor infractions by punishment rather than conduct thereby failing to give notice) or not complied with (fairness, FD 01/02.02; due process hearing, FD 01/01.03; and extended isolation, FD 01/07.03, A,B, & C). However, a full discussion here of those individual errors, although not insignificant, is not necessary because they are encompassed within the claims of due process violations of both the state and federal constitutions. Critical for purposes of this appeal is that inmates get copies of these policies (T. 283) and rely on the representations therein. Accordingly, an inmate may be aware when actions by prison guards exceed the scope of their authority.

In Wright v. Enomoto, 462 F.Supp. 397, 402 (N.D. Cal 1976), affirmed 434 U.S. 1052 (Feb. 21, 1978), the three judge panel clarified that prisoners who are moved to a maximum security unit, be it for disciplinary or for administrative reasons, suffer a severe impairment of the residuum of liberty they possess, and that such impairment triggers the requirement for due process safeguards. In reaching its conclusion the Wright v. Enomoto court reiterated an earlier conclusion of the United States Supreme Court:

[Imposition of "solitary" confinement] represents a major change in the condition of confinement and is normally imposed only when it is claimed and proved that there has been a major act of misconduct. Here . . . there should be minimum procedural safeguards as a hedge against arbitrary determination of the factual predicate for imposition of the sanction.

Wright v. Enomoto, 462 F.Supp. at 402 (citing Wolff v. McDonnell, 418 U.S. 539, 571-72 n.19 (1974)).

In Wright v. Enomoto the court held that prisoners moved to maximum security for administrative purposes must be provided with at least the minimal due process safeguards required for prisoners subject to maximum security confinement for disciplinary reasons. 462 F.Supp. at 403. The court quickly pointed out, however, that the deprivation suffered by a prisoner confined for administrative reasons is greater than that suffered by one confined on a disciplinary charge; the court also expressed that even more procedural protections may be required for the intrusive confinement of maximum security for administrative reasons. Id.

The Wright v. Enomoto court listed the minimal requirements as:

(1) written notice of the reasons in sufficient detail to enable the prisoner to prepare a response or defense, said notice to be furnished, except in case of genuine emergency, before initial placement in the maximum security unit, but, in any event, not more than forty eight (48) hours after such initial placement:

(2) a fair hearing before one or more prison officials, said hearing to be held not less than seventy-two (72) hours after placement in the maximum security unit unless the inmate requests, in writing, additional time in which to prepare a defense;

(3) representation by counsel-substitute when prison officials determine that the inmate is illiterate or that the complexity of the issues makes it unlikely that he can collect and present the evidence necessary for an adequate comprehension of the case; determination and designation of counsel-substitute to be made at the time of the giving of the aforesaid notice; if counsel-substitute is not provided, the reasons must be stated in writing at the time of the hearing;

(4) an opportunity to present witnesses and documentary evidence unless prison officials determine in good faith that permitting such evidence will be unduly hazardous to institutional safety or correctional goals;

(5) a written decision including references to the evidence relied upon and the reasons for such confinement.

462 F.Supp. at 404-05 (emphasis added). Cf. ABA Standards relating to the Legal status of Prisoners, Standards 23-3.1, 23-3.2, and 23-3.3 (1980). Although virtually none of these requirements were met in Mr. Duran's case up to the time of his criminal trial over one year later (T. 366, R. 177), as noteworthy is that his move to maximum security was a blatant abuse of authority performed in bad faith for reasons left unarticulated and unsupportable by the

facts. Moreover, Mr. Duran was allegedly moved for administrative reasons, not punitive reasons, and therefore, more than the above mentioned due process protections should have been afforded him.

Requirement number 1 of the Wright v. Enomoto court insists that written notice, in sufficient detail, should have been give to Mr. Duran before initial placement in maximum security. The permissible exception is only available in the case of genuine emergency. In Mr. Duran's case no emergency existed. Furthermore, the guards not only did not provide him with detailed written notice, they refused to even provide him with an acceptable oral explanation. Mr. Duran asked them why he was being moved, and the reply he received was something proximating "for all the little things you have done" (T. 182, 185). Such a response dramatically supports that no emergency existed and conclusively demonstrates an utter lack of notice.

An important caveat at this juncture is that the prison guard's response, for all the little things you have done, just may have been the best possible answer because, in reality, no legitimate reason existed for the guards to justify the move. (See Point I A 2, infra.) Notwithstanding this observation, the procedures employed in moving Mr. Duran grossly lacked any parallel to the minimum due process safeguards assured a prisoner moved to maximum security for disciplinary reasons and fall even shorter of the requisite due process afforded to a prisoner moved to maximum security for administrative purposes.

Mr. Duran asserts that an administrative move to maximum security -- barring the exception of real and genuine emergency -- must require a hearing before the placement in maximum security. That hearing would be accompanied by the panoply of rights which attach in disciplinary placements and would allow for a full and fair hearing insuring the safeguards of due process. A hearing before the placement in maximum security would give assurance that retaliatory and arbitrary misuse of authority (or manipulation by inmates) would be eliminated or minimized and at the very least ferretted out before a deprivation of the inmate's liberty interest occurs.

Examining this issue under the Utah Constitution further supports that Mr. Duran's rights were violated by the move to maximum security. The Utah Supreme Court has often discussed that the Due Process Clause of the Utah Constitution, Article 1, §7, affords, or may afford, greater protections than the federal counterpart. See State v. Earl, 716 P.2d 803 (Utah 1986); State v. Hygh, 711 P.2d 264 (Utah 1985) (Zimmerman, J., concurring); and Comment, The Utah Supreme Court and the Utah State Constitution, 1986 Utah Law Review 319. See also State v. Brickey, 714 P.2d 644 (Utah 1986).

The facts of this case at bar demand that inmates at the Utah State Prison be afforded greater protections before an administrative move to maximum security. In State v. Brickey, 714 P.2d 644 (Utah 1986), the Utah Supreme Court gave broader scope to the State Due Process Clause to insure that abuses of refiling

criminal charges were curtailed thereby safeguarding an accused's rights by limiting the harshness of repetitive preliminary examinations and the accompanying hardships. Brickey, 714 P.2d at 647. Likewise, in Mr. Duran's case the Due Process Clause of Article 1, §7, must operate to protect an accused from the loss of a liberty interest by requiring a hearing bore the harshness of the administrative move to maximum security with its accompanying hardships. Mr. Duran was not afforded such a hearing and his rights were violated. The events which followed the violation of his due process rights would likely have been eliminated because the hearing could have resolved the conflicts and disclosed the inadequacy of the need for a move to maximum security.

Supporting Mr. Duran's interpretation of the Utah Due Process Clause is Article 1, §9, of the Utah Constitution. That clause, in pertinent part, states, "Persons arrested or imprisoned shall not be treated with unnecessary rigor." While this language has yet to be interpreted in its "cruel and unusual punishment" context, State v. Bishop, 717 P.2d 261, 267 (Utah 1986), its plain language supports the assertions of Mr. Duran. Mr. Duran's move to maximum security, without a hearing before the move, was unnecessary. No emergency existed. Even assuming arguendo, that some action needed to be taken -- which Mr. Duran does not concede -- a less rigorous action was available. Mr. Duran could have been placed in the holding cell of his own unit to await a hearing. Evidence was introduced at trial which indicated that such a cell

was available (T. 155, 296); and that just the night before, inmate Neely had been placed in that cell prior to his ultimate move to maximum security (T. 237). At the very least Mr. Duran should have been treated the same way.

As the events transpired, three guards appearing at Mr. Duran's cell door, awakening him, and then entering and refusing to give a legitimate explanation for the move, subjected Mr. Duran to unnecessary rigor. The guards' insistence on taking him "the easy way or the hard way" (T. 319), and their ultimate use of excessive force in roughly forcing his face to the concrete floor and braking his dental plate (T. 309, 327), was also unnecessary rigor. The decision to move Mr. Duran to maximum security without a prior hearing was unnecessary. Further, the actions of the guards in attempting to effect the move were equally unnecessary and were in violation of Mr. Duran's constitutionally protected rights as assured by Article 1, §§ 7 and 9 of the Utah Constitution.

2. The decision to move Mr. Duran to maximum security was not justifiable from the facts. Even examining the facts in the light most favorable to the jury verdict, State v. McCardell, 652 P.2d 942, 945 (Utah 1982), the decision to move Mr. Duran from A-block to maximum security was unsupported and unjustified. During the Neely incident of the night of October 28, 1986, Officer Carpenter was preoccupied with inmate Neely and one other inmate who were both out of their cells and approaching him (T. 233). Officer Carpenter's testimony revealed that he was attuned only to the

response of the officers and the two assault situations from Neely and the other unnamed inmate (T. 236-37). In fact, Officer Carpenter's testimony disclosed some confusion as to where Mr. Duran may have been housed at the time of the incident (T. 235-36), and he admitted not seeing or hearing Mr. Duran do or say anything at all (T. 238).

Officer Carpenter filed a report on the Neely incident; that report did not mention Mr. Duran (T. 240). An hour later -- five hours after the incident -- Officer Carpenter wrote a second report alleging Mr. Duran had made a "threat of verbal violence" (T. 240-41). Again, however, Officer Carpenter admitted he had not heard or observed anything to form the basis of that report (T. 241). Only after writing the report did Officer Carpenter go talk to Mr. Duran; that visit was not to investigate the alleged threat, however, but rather was to inform Mr. Duran that he had written him up and that he [Officer Carpenter] personally would see that Mr. Duran would be next to go to maximum security (T. 242-43).

Acting Lieutenant Yakovich arrived at work the following morning, October 29, 1986, and reviewed reports of the previous evening. Acting Lieutenant Yakovich testified he relied primarily on the Carpenter report for his conclusion that Mr. Duran be moved to maximum security (T. 127). Specifically, that report stated only that Mr. Duran was heard making some sort of threat; it did not say who heard the threat nor how the voice was determined to be Mr. Duran's (T. 128). Acting Lieutenant Yakovich did not speak with Officer Carpenter for more information but chose only to read

secondary reports from an Officer Swant1 and one other officer whom he could not recall by name (T. 127). Yakovich did speak with Officer Swant1 and an inmate but did not attempt to speak with Mr. Duran (T. 124-25, 148). Acting Lieutenant Yakovich's investigation took thirty minutes whereupon he called his supervisor, Captain Johnson, and together -- over the phone and without Captain Johnson having the benefit of the reports -- they determined to move Mr. Duran to maximum security (T. 105-06, 130).

Officer Swant1's testimony revealed that she too lacked any personal knowledge of Mr. Duran's involvement, if any, in the Neely incident. Her testimony disclosed that she only suspected Mr. Duran of yelling and screaming and possibly throwing "commode" (defined by her as "shit and piss," T. 335) because she could not see or hear who was responsible. The following colloquy occurred during her testimony:

Q: [Mr. McDougall] Did you see Mr. Duran throw anything?

A: [Officer Swant1] We saw commode being thrown out of the cells and at that time we could --

Q: You saw what?

A: Commode. It was shit and piss.

Q: Did you see Mr. Duran do that?

A: Not directly but it was right there to where it could have been either him or the cell next to him.

Q: Did you hear Mr. Duran saying anything during this time that you were outside?

A: Yes. He was yelling and screaming with the others with the rest of the commotion.

Q: Do you recall anything specifically that he yelled or screamed at that time?

A: No because it was just they were like in harmony. It was everyone's voices going at the same time. All we were trying to do is hush them down so that we could let the other inmates who did want to sleep (T. 335-36).

Again on cross-examination Officer Swanti testified as follows:

Q: [Ms. Wells] When did you see or observe, personally, Mr. Duran involved in anything?

A: [Officer Swanti] As we were walking down, okay? As we are coming down the tier, all right? We saw a bunch of commode being thrown out. All right?

I asked Carpenter if we could write them up. He said because we weren't standing right exactly in front of his cell, it could have been either him or the gentleman next to him.

Q: Okay.

A: So therefore, we couldn't but the commode and stuff is coming out of the cell, all right. We are, therefore, they are all banging and screaming on the cages. We are walking by and as we are trying to get each one to settle down, he is standing up there doing his usual of screaming and yelling with the rest of them.

As we approach, then he steps back to act like he is not doing anything. We no sooner are past his cell, then he starts in with the yelling.

Q: Anything that Mr. Duran was doing was also being done by the other inmates; isn't that right?

A: As far as verbally yelling and stuff, yes.

Q: What you are saying about seeing excrement coming out of the cell, you are not able to say that that came from Mr. Duran are you?

A: No. It was there next to the cell.

Q: All right.

Likewise. When the altercation was going on down on the tier below with Mr. Neely and Officer Carpenter, you have no knowledge of anything that Mr. Duran was doing up a tier higher; isn't that right?

A: Well, when we were down below?

Q: Yes.

A: No.

Q: When you walked by, Mr. Duran stepped back and was silent; isn't that right?

A: Yes, until we passed.

Q: And his voice then blended with everyone else's?

A: Yes (T. 341-43).

This testimony of Officer Swanti demonstrates that she had no additional evidence to justify acting Lieutenant Yakovich's decision to move Mr. Duran to maximum security. Officer Swanti's information was mere conjecture and speculation at best; accordingly, acting Lieutenant Yakovich's decision was ill based.²

As the decision to move Mr. Duran to maximum security was without support, the appearance of the three officers in Mr. Duran's

² The other information purportedly relied on by Yakovich would likewise fail to support the decision. The other officer did not testify; nor did the inmate. More importantly, and even if that testimony could have been better based, such testimony would not have negated the need to have a hearing prior to the move to maximum security. See Point I A 1, Supra. Mr. Duran had the right to hear the stories proffered by the others and to tell his side as well. Such a hearing would also have disclosed biases, prejudices, misrepresentations, and attempts to manipulate which appear wholly possible from the facts of this case as indicated.

cell was unjustified and the demands they made of Mr. Duran were equally unlawful.

B. MR. DURAN LAWFULLY DEFENDED HIMSELF AGAINST
THE UNLAWFUL ACTIONS OF THE PRISON GUARDS.

Inasmuch as the actions of acting Lieutenant Yakovich and Officers Uriarte and Olin were without justification (see Point 1 A 1 and 2, supra), Mr. Duran was within his right to defend himself against the officers' unlawful force. In State v. Bradshaw, 541 P.2d 800 (Utah 1975), the Utah Supreme Court held that a statute which made a person guilty of interfering with a police officer if they resisted an arrest, whether it was lawful or not, was unconstitutional. From that action one may infer that it is lawful to resist an unlawful arrest. The replacement statute to the one held unconstitutional now limits the interference with a police officer to only those situations where the actor has knowledge, or should know, that the police officer is seeking to effect a lawful arrest. Utah Code Ann. § 6-8-305 (1953 as amended).³

More than half of the jurisdictions expressly recognize and/or apply this traditional common law rule allowing a person to resist an unlawful arrest by the use of reasonable force. See Annotation: Modern Status of Rules as to Right to forcefully Resist

³ §76-8-305. **Interference with peace officer making lawful arrest.** A person is guilty of a class B misdemeanor if he has knowledge, or by the exercise of reasonable care, should have knowledge, that a peace officer is seeking to effect a lawful arrest or detention of himself or another and interferes with such arrest or detention by use of force or by use of any weapon.

Illegal Arrest, 44 ALR 3d 1078 §3 (1976). Some of the jurisdictions even support that an arrestee may reasonably defend himself when greater force than is required is used against him. Id. at §6.

In the case at bar both the above situations apply: the prison guards used greater force than necessary to effect the equivalent of an arrest, and Mr. Duran reasonably defended himself against the guards' unlawful attempt to move him unjustifiably to a more stringent and restrictive section of the prison.

As detailed in the facts, Officer Carpenter issued a prison write-up on Mr. Duran for an unsupported violation and promised that he personally would see that Mr. Duran was next [after inmate Neely] to go to maximum security (T. 242-43). The following morning Mr. Duran was awakened by three guards at his door who then entered and insisted on taking him to maximum security (T. 306). Mr. Duran perceived this action as unlawful because he had done nothing wrong (T. 307). Yet, Mr. Duran still agreed to go with them if they would not handcuff him (T. 307).

Mr. Duran explained that his fear of being handcuffed was directly related to a prior occasion when once handcuffed he was beaten (T. 316). He feared, reasonably so under the circumstances of the prior evening's exchange with Officer Carpenter and the presence of three guards now in his cell, that he would again be beaten (T. 308, 314-15, 318).

This fear was legitimate and reasonable. As Mr. Duran succinctly explained from the witness stand, "[I]t only takes one

officer to handcuff an inmate" (T. 315). The presence of the three guards within his cell also comprised a greater force than necessary to do their stated job. Moreover, the guards indicated they could do it the hard way or the easy way. Under the totality of the circumstances, Mr. Duran justifiably perceived a threat. He retreated to the back wall of his cell (T. 166, 183), and when he had no where else to go he punched acting Lieutenant Yakovich in the nose in an effort, as he stated, "to get him away from me" (T. 313), or in other words, self defense.

The defense of self defense and the defense of habitation are statutorily authorized in this jurisdiction, Utah Code Ann. §§ 76-2-402 and 76-2-405 (1953 as amended) (See Addendum A), and instructions on these defenses were given to the jury (P. 111-12, 114-19). The jury's decision to not find the defenses applicable was erroneous and unsupportable. The Utah Supreme Court in State v. Knoll, 712 P.2d 111, 11 (Utah 1985), stated that "a defendant is not required to establish a defense of self defense beyond a reasonable doubt, or even by a preponderance of the evidence." Rather, the Court explained, "if there exists a reasonable doubt in any case where the accused was justified or excusable, then there exists a reasonable doubt as to his guilt." Id. at 215 (quoting State v. Vacos, 120 P. 497, 502 (Utah 1911)).

That reasonable doubt existed in Mr. Duran's case such that it was "inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the

crime for which he was convicted." State v. Petree, 659 P.2d 443, 444 (Utah 1983). Accordingly, this Court has the right and obligation to review the jury's decision in light of the evidence and reverse the conviction. Id.

POINT II.

THE TRIAL COURT ERRED IN FAILING TO GRANT MR. DURAN'S PRE-TRIAL MOTION TO REDUCE THE CHARGE AGAINST HIM TO A CLASS 'A' MISDEMEANOR.

Prior to trial Mr. Duran filed a motion to reduce the charge against him to a Class 'A' Misdemeanor (R. 28-31). After oral argument that motion was denied by the trial court (R. 39). Mr. Duran contends that the trial court erred when it denied that motion, and he requests that this Court correct that error and grant him a new trial on the misdemeanor charge.

In 1969, the Utah Supreme Court ruled in the case of State v. Shondel, 453 P.2d 146, (Utah 1969), that where the illegal conduct of a criminal defendant could be prohibited under two separate statutes with one crime proscribing a more severe punishment, the defendant is entitled to the benefit of the lesser punishment.

Mr. Duran was charged with the offense of Assault by a Prisoner, a Third Degree Felony in violation of Title 76, Chapter 5, Section 102.5, Utah Code Annotated (1953 as amended). The illegal conduct prohibited under this section is:

§76-5-102.5 Assault by a Prisoner -- Any prisoner who commits assault by intending to cause bodily injury, is guilty of a felony of the third degree.

However, according to §76-5-102.4 it is a Class A Misdemeanor if "any person" commits an assault on a peace officer. Section 76-5-102.4 Assault against a peace officer on Duty states that:

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

This provision neither modifies, is made subject to, nor is limited by §76-5-101.5. Under these two statutory schemes, the same act -- assaulting a peace officer while an inmate -- is prohibited. One carries a misdemeanor penalty; the other is a felony.

As the Supreme Court did in Shondel, supra, the trial court should have reconciled the inconsistency. In Shondel, the Supreme Court reconciled a criminal statute making possession of LSD a misdemeanor with an overlapping provision of Utah's Narcotic Drug Act which made the same offense a felony. In its ruling the Court stated:

A statute creating a crime should be sufficiently certain that persons of ordinary intelligence . . . may know how to conduct themselves in conformity with it.

453 P.2d at 148.

Further, in ruling that the appellant therein was guilty of a misdemeanor rather than a felony, the Shondel court said that:

A penal statute should be clear, specific and understandable as to the penalty imposed for its violation.

Id.

Finally, the ruling in Shondel, is that:

If there is doubt or uncertainty as to which of two punishments is applicable to an offense an accused is entitled to the benefit of the lesser.

Id. Mr. Duran was charged with assaulting a Utah State Correctional Officer. An accused cannot be reasonably expected to know that he could be convicted of a felony rather than a misdemeanor under these circumstances.

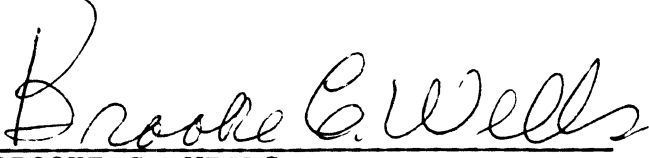
Under the law of the State of Utah, as set forth in State v. Shondel, the trial court should have reduced the charge against Mr. Duran from the felony to the applicable misdemeanor.

It was error for the trial court to deny the motion. Therefore, this Court should reverse that decision and remand for a new trial on the misdemeanor charge.

CONCLUSION

For all or any of the foregoing reasons, Mr. Duran respectfully asks that this Court reverse his conviction and remand the case to the District Court for either dismissal of the charges or a new trial.

RESPECTFULLY submitted this 30th day of August, 1988.


BROOKE C. WELLS
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, BROOKE C. WELLS, hereby certify that eight copies of the foregoing will be delivered to the Utah Court of Appeals, 230 South 500 East, Suite 300, Salt Lake City, Utah, 84102, and four copies to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah 84114, this 30th day of August, 1988.

Brooke C. Wells

DELIVERED by _____ this _____ day of August, 1988.

ADDENDUM A

76-2-402. 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 forcible 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.

(3) For purposes of this section, a forcible felony includes aggravated assault, mayhem, murder in the first and second degree and manslaughter, kidnaping, and aggravated kidnaping, rape, forcible sodomy, and aggravated sexual assault, as they are defined in chapter 5 of this code, and also includes arson, robbery, and burglary, as defined in chapter 6 of this code. Any other felony offense which involves the use of force or violence against a person so as to create a substantial danger of death or serious bodily injury also constitutes a forcible felony. Burglary of a vehicle, as defined in section 76-6-204, shall not constitute a forcible felony except where the vehicle is occupied at the time unlawful entry is made or attempted.

76-2-405. Force in defense of habitation.

(1) A person is justified in using force against another when and to the extent that he reasonably believes that the force is necessary to prevent or terminate the other's unlawful entry into or attack upon his habitation; however, he is justified in the use of force which is intended or likely to cause death or serious bodily injury only if:

(a) the entry is made or attempted in a violent and tumultuous manner, surreptitiously, or by stealth, and he reasonably believes that the entry is attempted or made for the purpose of assaulting or offering personal violence to any person, dwelling, or being in the habitation and he reasonably believes that the force is necessary to prevent the assault or offer of personal violence; or

(b) he reasonably believes that the entry is made or attempted for the purpose of committing a felony in the habitation and that the force is necessary to prevent the commission of the felony.

(2) The person using force or deadly force in defense of habitation is presumed for the purpose of both civil and criminal cases to have acted reasonably and had a reasonable fear of imminent peril of death or serious bodily injury if the entry or attempted entry is unlawful and is made or attempted by use of force, or in a violent and tumultuous manner, or surreptitiously or by stealth, or for the purpose of committing a felony.