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IN THE SUPREME COURT

OF THE STATE OF UTAH

PAMELA PECK,

Plaintiff-Appellant,

vs.

WILLIAM DUNN, et al,

Defendant-Respondent.

BRIEF OF APPELLANT

Appeal from a judgment of the Third Judicial District Court in and for Salt Lake County, State of Utah.

Honorable Jay E. Banks, Judge

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT

OF THE STATE OF UTAH

PAMELA PECK, Plaintiff-Appellant, vs. WILLIAM DUNN, et al, Defendant-Respondent.	:	Case No. 15338

BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

The appellant, Pamela Peck, sought relief in the Third Judicial District Court in and for Salt Lake County, State of Utah, on the ground that Title 16, Chapter 3, Section 28 of the Revised Ordinances of Salt Lake County is unconstitutional.

DISPOSITION IN THE LOWER COURT

The Third Judicial District Court in and for Salt Lake County, State of Utah, denied appellant's Motions for Declaratory Judgment and Summary Judgment and granted respondent's Motion to Dismiss on June 29, 1977, on the ground that Title 16, Chapter 3, Section 28 of the Revised Ordinance of Salt Lake County is constitutional and a valid exercise of the powers of tbe Board of County

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Commissioners of Salt Lake County. The Honorable Jay E. Banks, Judge, presided.

STATEMENT OF THE FACTS

The appellant, Ms. Pamela Peck, was charged by a complaint on January 8, 1977, with the crime of cruelty to animals in violation of §16-3-28 of the Revised Ordinan of Salt Lake County, 1966, as amended. Section 16-3-28 o the Revised Ordinances of Salt Lake County (effective May 5, 1976) entitled Cruelty Prohibited; subsection (h) Nuisa to Keep Animals for Fighting states as follows:

> Any person, firm or corporation, who shall raise, keep or use any animal, fowl, or bird for the purpose of fighting or baiting; and any person who shall be a party to or be present as a spectator at any such fighting or baiting of any animal or fowl; and any person, firm or corporation who shall rent any building, shed, room, yard, ground or premises for the purposes aforesaid; or shall knowingly suffer or permit the use of his buildings, sheds, rooms, yards, grounds, or premises for the purposes aforesaid; and any person, firm or corporation who shall knowingly carry, haul, or deliver any animal, fowl or bird to be used for any of the purposes aforesaid, shall be guilty of a Class "B" Misdemeanor, and shall be subject to a fine in an amount not to exceed $229.00 or imprisoned in the County Jail not to exceed six months, or both.

The appellant was charged with a violation of only the clause of the above-mentioned ordinance which states "and any person who shall be a party to or be present as a spectator at any such fighting or baiting of any animal or fowl,... shall be guilty of a Class "B" Misdemeanor,

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and shall be subject to a fine in an amount not to exceed $299.00 or imprisoned in the County Jail not to exceed six months, or both."

The appellant is a person whose rights, status, and/or other legal relations are affected by the above-dsecribed ordinance within the meaning of Utah Code Ann., §78-33-2 (1953).

On March 21, 1977, the appellant filed an Amended Complaint naming the Board of County Commissioners as defendants. The Amended Complaint requested the Court to issue an Order and Judgment declaring said county ordinance to be unconstitutional.

On April 13, 1977, the respondents moved to dismiss the complaint on the ground that said county ordinance is constitutional. The appellant's Motions for Summary Judgment and Declaratory Judgment were denied and respondent's Motion to Dismiss was granted on June 29, 1977, on the grounds that said ordinance is constitutional and a valid exercise of the Powers of the Board of County Commissioners, respondents herein.

The record indicates that the appellant was present at a cockfight. There is no evidence in the record to indicate that Ms. Peck was present as a spectator, or that she intended to be present as a spectator or that she intended to commit an offense or that she intended that others should commit an offense.

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In this appeal, the appellant is challenging the dismissal of her complaint in the lower court and the constitutionality of said county ordinance.

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POINT I

SALT LAKE COUNTY REVISED ORDINANCE 16-3-28(h), 1966, AS AMENDED, IS SO VAGUE THAT MEN OF COMMON INTELLIGENCE MUST NECESSARILY GUESS AT ITS MEANING, AND DIFFER AS TO ITS APPLICATION AND HENCE IT VIOLATES THE FIRST ESSENTIAL OF DUE PROCESS OF LAW.

ARGUMENT

The appellant in the above-entitled action, Ms. Pamela Peck, was charged under Section 16-3-28(h) of the Revised Ordinances of Salt Lake County, 1966, as amended, which states:

> Any person, firm or corporation, who shall raise, keep or use any animal, fowl, or bird for the purpose of fighting or baiting; and any person who shall be a party to or be present as a spectator at any such fighting or baiting of any animal or fowl; and any person, firm or corporation who shall rent any building, shed, room, yard, ground, or premises for any such purposes as aforesaid; or shall knowingly suffer or permit the use of his buildings, sheds, rooms, yards, grounds, or premises for the purposes aforesaid; and any person, firm, or corporation who shall knowingly carry, haul, or deliver any animal, fowl, or bird to be used for any of the purposes aforesaid, shall be guilty of a Class "B" Misdemeanor, and shall be subject to a fine in an amount not to exceed $299.00 or imprisoned in the County Jail not to exceed six months, or both.

More specifically, the State charged that on or about January 8, 1977, Ms. Pamela Peck was unlawfully "...present as a spectator at such fighting or baiting of a fowl...." Section 16-3-28(h) of the Salt Lake County

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Revised Ordinances in pertinent part.

The crux of the appellant's argument is that the portion of the ordinance with which she is charged is unconstitutionally vague and overbroad inasmuch as it encompasses within its express language what may be essentially innocent conduct.

In a recent case decided by the Supreme Court of Hawaii the court held that an ordinance or statute proscribing presence, whether at a cockfight, gambling game, or house of prostitution, is too vague to satisfy the requirements of due process. State v. Abellano, 50 Hawaii 384, 441 P.2d 333 (1968). In Abellano, thirteen persons were arrested for violation of an ordinance which charged that the defendants "did engage or participate in, or were present at, a cockfight exhibition." Abellano, supra, at 334. The district court dismissed the complaint and the appellate court affirmed on the ground that the ordinance was vague and, hence, unconstitutional. A criminal statute is unconstitutional if it is not

> ...sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties***. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. Abellano, supra, at 334 quoting from Connally v. General Const., Co., 269 U. S. 385, 391 (1926).

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In particular, the Abellano court was concerned with the proscription of "presence."

> An ordinance or statute proscribing presence, whether at a cockfight, a gambling game, or a house of prostitution, is too vague to satisfy the requirements of due process. Primarily, the term presence has a spacio-physical frame of reference. Unless the activity at which presence is unlawful is in a narrowly confined place, determination of what constitutes presence at the activity can be resolved only on the basis of policy. Setting such policy is a legislative function. The legislative body has failed to make clear its policy determination. For this court to attempt to rewrite the ordinance to cure the constitutional defect would be an unconstitutional exercise of legislative power. Abellano, supra, at 334.

The facts of the Abellano case closely parallel the facts of the case at bar. The appellant herein was charged with being present at a cockfight. The term presence is nowhere defined in the ordinance. Inasmuch as the respondents have failed to clarify said term, the ordinance suffers from a constitutional defect, that is, the indefiniteness of the term presence fails to inform with sufficient explicitness what conduct will render an individual criminally liable.

The Nebraska Supreme Court recently laid down guidelines to assist in determining whether a statute defining an offense is void for uncertainty. The rule is:

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> (1) Whether the language may apply not only to a particular act about which there can be little or no difference of opinion, but equally to other acts about which there may be radical differences, thereby devolving on the court the exercise of arbitrary power of discriminating between the several classes of acts, and (2) the dividing line between what is lawful and what is unlawful cannot be left to conjecture." Adkins, supra at 658, quoting from State v. Ruback, 135 Neb. 355, 281 N.W. 607, 609 (1938).

In Adkins, the defendants were charged with a violation of the Controlled Substance Act. The district court affirmed the ruling of the county court which had dismissed the actions on grounds that the section of the Act under which defendants were charged was unconstitutionally vague and overbroad on its fact. The Supreme Court affirmed. The Nebraska Statute provided as follows:

> (1) It shall be unlawful for any person:***(g) To visit or be in any room, dwelling, house, vehicle, or place where any controlled substance is being used contrary to the provisions of..., if the person has knowledge that such activity is occurring;*** Adkins, supra at 655.

* * *

> Under the express terms of said section only three things are necessary to constitute a crime. A person need only (1) be in a place, (2) where a violation of the Controlled Substances Act is being committed, and (3) with knowledge that such activity is occurring. It is evident that the statute as written is broad enough to encompass entirely innocent behavior. Individuals may find themselves in situations such as at parties, theaters, dance halls, hotel lobbies, buses,

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> apartments, taxis, or even in private automobiles, where their conduct has no relation to the acts of others who may be disposed to use controlled drugs. Adkins, supra at 657.

The court held that the above-mentioned portion of the Controlled Substances Act violated the two-pronged test; the court would have to arbitrarily distinquish lawful acts from unlawful acts inasmuch as the statutory language embraced not only acts commonly recognized as reprehensible, but also others which it was unreasonable to presume were intended to be made criminal.

It is apparent that the county ordinance here under attack suffers the same infirmities as did the Nebraska Controlled Substances Act. The ordinance is so vague that the court must decide not only if the accused is guilty of the proscribed conduct, but must first determine what conduct is actually proscribed, thus devolving to the court the duty to discriminate between what is lawful and what is unlawful. Applying the Nebraska test, the county ordinance should be declared unconstitutionally vague.

The factual situations in both Abellano, supra, and Adkins, supra, closely parallel the facts in the case at bar. The defendants in all three cases were charged with committing the offense of "presence at the scene of a crime." The courts in Abellano and Adkins found the statutes unconstitutionally vague in contravention of the Due Process and Equal Protection Clauses of the Fourteenth

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Amendment to the United States Constitution. The appella
submits that the lower court's order should be reversed a
the action against her dismissed.

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POINT II

THE COUNTY ORDINANCE WHICH PUNISHES MERE PRESENCE AT A COCKFIGHT FAILS TO REQUIRE A CULPABLE MENTAL STATE.

ARGUMENT

To be convicted of committing any public offense, the State must prove that the accused evinced the requisite criminal intent to commit said offense. State v. McKinnon, 556 P.2d 906 (1976).

> This court has long adhered to the principle that more than mere presence at the scene of a crime is necessary to establish criminal intent. McKinnon, supra, at 909. See also State v. McComas, 85 Mont. 428, 278 P.993 (1929).

Mere knowledge or physical presence at the scene of a crime neither constitutes a crime nor supports a charge of aiding and abetting a crime. State v. J-R Distributors, Inc., 82 Wash. 2d 584, 512 P.2d 1049 (1973). In J-R Distributors, the defendants were convicted of the sale and exhibition of obscene materials, and for aiding and abetting in such sales. On appeal, the case against one defendant was dismissed because the evidence was insufficient to show aiding and abetting.

> To find one guilty as a principal on the ground that he was an aider and abetter, it must be proven that he shared in the criminal intent of the principal ....aiding and abetting...assumes some participation in the criminal act in furtherance of the common design....J-R Distributors, supra, at 1055.

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In other words, the word "abet" includes (1) knowledge of the perpetrator's wrongful purpose, and (2) encouragement, promotion or counsel of another in the commission of the criminal offense. The defendant in J-R Distributing, supra, wrapped pornographic magazines in cellophane. His knowledge of the store owner's wrongful purpose was insufficient to sustain a charge of aiding because he did not share with the store owner an intent to sell any of the magazines.

In a recent California case, the court stated that in order to hold an accused as an aider or abetter "the test is whether the accused in any way, directly or indirectly, aided the perpetrator by acts or encouraged him by words or gestures." People v. Villa, 156 Cal. App. 2d 128, 318 P.2d 828, 833 (1957).

The County ordinance here under attack punishes mere presence at a cockfight. Caselaw holds that mere presence neither constitutes a crime nor supports a charge of aiding or abetting in the commission of a crime.

Ms. Peck, the appellant herein, was charged with the crime of being present at a cockfight. The record does not evidence that she aided or abetted the principal either through actions, gestures, or words. There is no evidence that she had knowledge of an unlawful purpose or that she intended to commit a crime. Appellant's conviction of the crime of presence at a cockfight, without more, is

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insufficient to sustain a charge of criminal malfeasance.

There is in existence a state statute which addresses the issue of criminal responsibility for the commission of an offense and it reads as follows:

> Every person acting with the mental state required for the commission of an offense who directly commits an offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct. Utah Code Ann., §76-2-202, as amended in 1973.

Said statute explicitly requires a culpable mental state to commit or an affirmative action to induce an offense.

Pursuant to Utah Code Ann., §17-5-35, 1953 as amended, and Article VI, §28 of the Constitution of Utah, County of Salt Lake is empowered to enact certain legislation unless it conflicts with state statutes. The County Ordinance under attack proscribes mere "presence" at the scene of a crime and does not require any showing of a culpable mental state. The State statute hereinabove cited specifies that absent a showing of a culpable mental state, an accused cannot be held criminally responsible for his actions. The ordinance is in direct conflict with the statute. The ordinance, therefore, has no force and effect and the appellant respectfully requests that this court declare Section 16-3-28 of the Revised Ordinances of Salt Lake County to be null, void and unenforceable and in conflict with the general laws of the State of

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Utah and beyond the scope of the power and authority of the Board of County Commissioners for Salt Lake County, State of Utah.

CONCLUSION

Appellant submits that her charge be dismissed. Title 16, Chapter 3, Section 28 of the Revised Ordinances of Salt Lake County is unconstitutionally vague and overbroad inasmuch as it encompasses within its express languag what may be essentially innocent conduct. The Supreme Court of Hawaii has recently decreed that an ordinance proscribing presence at a cockfight is too vague to satisfy the requirements of due process. Abellano, supra, Adkins, supra.

The case at bar presents similar factual situatio as that found in Abellano. The term "presence" is so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. The county ordinance is unconstitutionally vague and is thereby render null and void. Adkins, supra.

The ordinance fails to require a culpable mental state to be present as a spectator at a cockfight. As a result, it embraces innocent conduct as well as reprehensib The ordinance has no legal force or effect inasmuch as it conflicts with Utah Code Ann., §76-2-202, supra, which expressly states that absent a showing of intent, an accuse cannot be held criminally reponsible for his actions.

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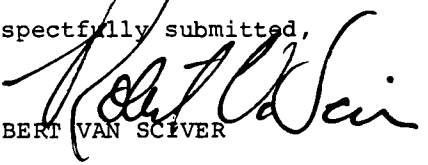
Appellant submits that the decision of the lower court be reversed and the charges against her dismissed.

DATED this day of October, 1977.

Respectfully submitted,



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