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Patrick B. Nolan; Attorney for Appellant.

Recommended Citation
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UTAH COURT OF APPEALS
BRIEF

UTAH
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DOCKET NO. 880099-CA

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff-Appellant, vs. ROGER DALE SMITH, Defendant-Respondent.	)))))))))	Case No. 880099-CA Classification Priority 2

BRIEF OF RESPONDENT

Appeal from a judgment of the Circuit Court of Garfield County, the Honorable David L. Mower, dismissing an Information charging the Defendant-Respondent with custodial interference, a third-degree felony.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	)	Case No. 880099-CA
Plaintiff-Appellant,	)	
vs.	)	
ROGER DALE SMITH,	)	Classification Priority 2
Defendant-Respondent.	)	

BRIEF OF RESPONDENT

JURISDICTION AND NATURE OF THE PROCEEDINGS

The jurisdiction of the Court of Appeals in this matter is by virtue of Utah Code Annotated, Section 78-2A-3(2)(c).

STATEMENT OF THE ISSUES

1. Can a person be charged with a violation of 76-5-303, Utah Code Annotated, 1953, as amended, when the person assisted a child under the age of 16 to leave the state of Utah and travel to the state of Colorado, when there was no custody award regarding that child by a court of competent jurisdiction?

2. Does the State's only remedy in cases of this nature lie with the legislature in enacting a new statute covering cases of this type?

DETERMINATIVE STATUTES

76-5-303. U.C.A., 1953, AS AMENDED. CUSTODIAL INTERFERENCE.

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(1) A person, whether a parent or other, is guilty of custodial interference if, without good cause, the actor takes, entices, conceals, or detains a child under the age of 16 from its parent, guardian, or other lawful custodian:

(a) Knowing the actor has no legal right to do so; and

(b) With intent to hold the child for a period substantially longer than the visitation or custody period previously awarded by a court of competent jurisdiction.

(2) A person, whether a parent or other, is guilty of custodial interference if, having actual physical custody of a child under the age of 16 pursuant to a judicial award of any court of competent jurisdiction which grants to another person visitation or custody rights, and without good cause the actor conceals or detains the child with intent to deprive the other person of lawful visitation or custody rights.

(3) Custodial interference is a class A misdemeanor unless the child is removed and taken from one state to another, in which case it is a felony of the third degree.

STATEMENT OF THE CASE

The Defendant-Respondent was originally charged in the Circuit Court of Garfield County with the offense of custodial interference, a third-degree felony. The Defendant was arrested in the state of Colorado, and waived extradition and voluntarily appeared in Garfield County. At the preliminary hearing, the State rested its case and counsel for the Defendant moved the

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court to dismiss for failure to make a prima facie case. The court granted the motion, and the State appealed that ruling.

SUMMARY OF ARGUMENT

1. The provisions of 76-5-303, U.C.A, 1953, as amended, require that a custody degree must be entered by a court of competent jurisdiction in order for an individual to commit the offense of custodial interference.

2. The State's only remedy in this case is to seek a legislative enactment to make the Defendant's conduct a felony offense.

ARGUMENT

I

THE PROVISIONS OF 76-5-303, U.C.A., 1953, AS AMENDED, REQUIRE THAT A CUSTODY DEGREE MUST BE ENTERED BY A COURT OF COMPETENT JURISDICTION IN ORDER FOR AN INDIVIDUAL TO COMMIT THE OFFENSE OF CUSTODIAL INTERFERENCE.

The legislative intent was clear when 76-5-303, U.C.A., 1953, as amended, was passed. The statute requires that the State prove the Defendant took a child under the age of 16 from its parent or guardian knowing that he had no right to do so and with intent to hold a child for a period substantially longer than visitation or custody allowed by a prior court order. The use of the conjunctive "and" between sub-paragraphs (a) and (b) of the first paragraph of the statute makes it clear that the legislature had the intent to address only the very limited

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circumstance where an individual interferes with the custody of a minor child whose custody has been ruled upon by a court of competent jurisdiction. In addressing this issue, the legislature made it possible to initiate extradition of those taking children across state lines in violation of court decrees by increasing the level of the offense to a third-degree felony. It is clear from the facts of this case that the State's prosecutor initiated the prosecution under the provisions of 76-5-303, U.C.A., 1953, as amended, in order to have the force of a felony charge to enable the State to extradite the Defendant from the state of Colorado where he had taken the minor. The use of the word "and" precludes the State of Utah from construing the statute as broadly as the State would have the court follow in this case.

Even though the provisions of the criminal code have abandoned the strict construction rule, 76-1-106, U.C.A., 1953, as amended, the use of the word "and" by the legislature rather than the word "or" makes it clear that the legislature's purpose was to narrowly define the proscribed conduct in 76-5-303, U.C.A., 1953, as amended.

II

THE STATE'S ONLY REMEDY IN THIS CASE IS TO SEEK A LEGISLATIVE ENACTMENT TO MAKE THE DEFENDANT'S CONDUCT A FELONY OFFENSE.

The State has, in its Brief, cited statutes from Arizona, California, Colorado, Idaho, Kansas, New Mexico, Oregon, and

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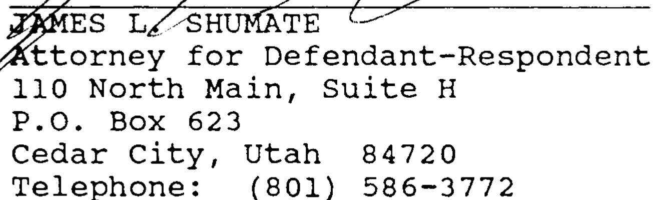
Washington. The several cited cases construing those statutes indicate an appropriate legislative solution to this problem. The legislature could define legal custody in any number of ways other than that established by a court of competent jurisdiction. If such other definition were used, then the State's remedy when a child is taken across state lines would be easily available. The legislature could make such conduct a felony and those engaging in those acts could be charged and extradited.

CONCLUSION

The trial court appropriately interpreted the statute in question and its ruling should be upheld.

Respectfully submitted this 9 day of June, 1988.



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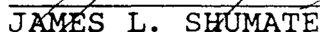
MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the above BRIEF OF RESPONDENT to Mr. Patrick B. Nolan, Attorney for Plaintiff-Appellant, 55 South Main Street, Panguitch, Utah 84759, this 9 day of June, 1988, first class postage fully prepaid.



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