

1978

State of Utah v. Dennis Loveless : Reply Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. Steven Vanderlinden; Attorney for Respondent Jackson Howard; Attorney for Appellant

Recommended Citation

Reply Brief, *Utah v. Loveless*, No. 15511 (Utah Supreme Court, 1978).
https://digitalcommons.law.byu.edu/uofu_sc2/950

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

Original

IN THE SUPREME COURT
OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff-
Respondent,

-vs-

DENNIS LOVELESS,

Defendant-
Appellant.

REPLY BRIEF OF

APPEAL FROM THE JUDGMENT
DISTRICT COURT OF DAVIS COUNTY
HONORABLE J. DUFFE

STEVEN VANDERLINDEN
Deputy County Attorney
Davis County Courthouse
Farmington, Utah 84025
Attorney for Respondent

IN THE SUPREME COURT
OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-	:	
Respondent,	:	
-vs-	:	
DENNIS LOVELESS,	:	Case No. 15,511
Defendant-	:	
Appellant.	:	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE SECOND JUDICIAL
DISTRICT COURT OF DAVIS COUNTY, STATE OF UTAH
HONORABLE J. DUFFY PALMER, PRESIDING

JACKSON HOWARD, for:
HOWARD, LEWIS & PETERSEN
120 East 300 North
Provo, Utah 84601
Attorneys for Appellant

STEVEN VANDERLINDEN
Deputy County Attorney
Davis County Courthouse
Farmington, Utah 84025
Attorney for Respondent

TABLE OF CONTENTS

	<u>PAGE</u>
REPLY TO STATEMENT OF FACTS	1
APPELLANT DID NOT WAIVE ANY CLAIM OF ERROR BY FAILING TO OBJECT PRIOR TO THE PRONOUNCEMENT OF JUDGMENT	1
THE TWO STATUTES PROSCRIBE THE SAME CONDUCT AND THE APPELLANT IS ENTITLED TO BE PUNISHED IN ACCORDANCE WITH THE LESSOR PENALTY	3
CONCLUSION	5

TABLE OF STATUTES CITED

§77-37-1, U.C.A. (1975)	2
-------------------------	---

TABLE OF CASES CITED

<u>Rammell v. Smith</u> , 560 P.2d 1108 (Utah 1977)	4
<u>State v. Cassius</u> , 21 Ariz. App. 78, 515 P.2d 903 (1973)	3
<u>State v. Chavez</u> , 77 N.M. 79, 419 P.2d 456 (1966)	4
<u>State v. Mills</u> , 96 Ariz. 377, 396 P.2d 5 (1964)	3
<u>State v. Thacker</u> , 98 Idaho 369, 564 P.2d 1278 (1977)	3
<u>State v. Vickery</u> , 85 N.M. 389, 512 P.2d 962 (1973)	3

IN THE SUPREME COURT
OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-	:	
Respondent,	:	
-vs-	:	
DENNIS LOVELESS,	:	Case No. 15,511
Defendant-	:	
Appellant.	:	

REPLY BRIEF OF APPELLANT

REPLY TO STATEMENT OF FACTS

The mischief in the State's initial statement of facts is that it attempts to divert the attention of the Court from the issue on appeal to the moral character and nature of the crime involved. Further, the government's recital of the facts surrounding the submission of the verdict form to the jury is again totally irrelevant to the basis of this appeal. The appellant's contention is simply that where there are two statutes which proscribe the same conduct but impose different penalties, the violator is entitled to be punished in accordance with the lesser penalty.

APPELLANT DID NOT WAIVE ANY CLAIM OF ERROR BY FAILING TO OBJECT PRIOR TO THE PRONOUNCEMENT OF JUDGMENT.

First, the fact that the two statutes circumscribed the same kind of conduct was brought to the Court's attention in

earlier proceedings. This is reflected by Mr. Howard's comments at the time the sentence was pronounced (T. 9, lines 8 and 9).

Second, it is the appellant's position that there is no duty on the part of a defendant to object to a pronouncement of judgment before it is made by the Court. Such a procedural gesture on the part of a defendant would be presumptive, untimely and rude. The government's argument, by its nature, requires and assumes that the defendant or his counsel be clairvoyant.

Accordingly, Utah Code Annotated, 77-37-1 (1975), establishes the presumption that the verdict and judgment are deemed excepted to and no other action outside the perfection of the appeal is required to preserve the issue on appeal. The statute states:

The verdict of the jury, and all orders, decisions and rulings made by the district court, or judge thereof, including rulings on objections to, or motions to strike out, evidence, from the inception of the cause shall be deemed excepted to. Exceptions to instructions to the jury shall be taken and preserved as in civil cases. U.C.A. §77-37-1 (1975).

The appellant actually went beyond the requirements of the statute and actively objected to the sentence pronounced by the Judge (T. 9, lines 9-12).

The State cites State v. Thacker, 98 Idaho 369, 564 P.2d 1278 (1977), for the proposition that error relating to the sentencing process must be timely raised. That case does not deal with an objection to sentencing, but instead, deals with a defendant's contention on appeal that a pre-sentence report, which he had previously read and approved, was inadequate. The Court held that since the defendant's attorney had stated that he had gone over the report and was satisfied with it, the defendant could not argue on appeal that it was inadequate. The government cites no authority to support the supposition that a timely objection to judgment must precede the judgment itself. The law is clearly contra. See State v. Mills, 96 Ariz. 377, 396 P.2d 5 (1964); State v. Cassius, 21 Ariz. App. 78, 515 P.2d 903 (1973) and State v. Vickery, 85 N.M. 389, 512 P.2d 962 (1973). Vickery, supra, holds that where there are two statutes providing different penalties for identical acts, there is a constitutional question as to whether the one providing the higher penalty offends the requirement of equal protection and such a question can be raised for the first time on appeal.

THE TWO STATUTES PROSCRIBE THE SAME CONDUCT AND THE APPELLANT IS ENTITLED TO BE PUNISHED IN ACCORDANCE WITH THE LESSOR PENALTY

The State's argument is concessional and impliedly admits that if the statutes proscribe the same conduct, the

defendant is entitled to be punished in accordance with the lessor penalty. The government maintains that:

The two statutes would proscribe the same conduct if, and only if, the victim's age is used to establish both lack of consent and the aggravating circumstance. (Respondent's Brief P.6)

Even if the above point is conceded to the government, the evidence shows that lack of consent and the aggravating circumstance were established by the victim's age. The information upon which the defendant was convicted accused him of the following specific conduct:

On or about the 6th day of February, 1977, at Farmington, County of Davis, State of Utah, the above defendant did have sexual intercourse with a female, not his wife, to wit" Brenda Winnett, under the age of 14. (R.1).

The indictment does not allege any aggravating circumstance other than the age of the victim. The age of the victim was necessarily used to establish both lack of consent and aggravating circumstances, otherwise there would not have been a prima facie case of Aggravated Sexual Assault.

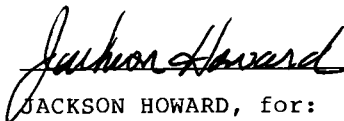
The government cannot now claim that it could have proved other aggravating circumstances that are totally outside the pleadings used to indict the defendant. The appellant has proven that the specific conduct complained of the defendant is proscribed by two statutes, State v. Chavez, 77 N.M. 79, 419 P.2d 456 (1966), and thus he is entitled to the lessor punishment. Rammell v. Smith, 560 P.2d 1108 (Utah 1977).

CONCLUSION

The brief of the government has done nothing to change the obvious fact that the specific conduct alleged in the indictment which the appellant was convicted of was taken from the rape statute and the only way that language could be converted into a prima facie case of Aggravated Sexual Assault would be for the alleged "age" element to be used both to establish lack of consent and an aggravating circumstance. The defendant's conduct is thus proscribed by both statutes and the State apparently agrees that under those circumstances, the appellant has a right to the lesser punishment.

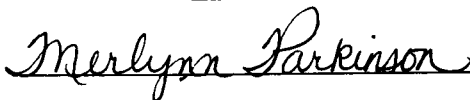
Finally, there is no basis in the law to challenge the manner in which the appellant has preserved this issue for appeal.

Respectfully submitted this 24th day of May, 1978.



JACKSON HOWARD, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Appellant
120 East 300 North
Provo, Utah 84601

MAILED a copy of the foregoing Brief of Appellant to Steven C. Vanderlinden, Deputy County Attorney, Davis County Courthouse, Farmington, Utah, 84025, this 24th day of May, 1978.



Secretary