1978

State of Utah v. Dennis Blaine Angus : Brief of A Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

DENNIS BLAINE ANGUS,

Defendant-Appellant.

Case No. 15525

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE [illegible]
JUDICIAL DISTRICT COURT, IN AND FOR [illegible]
COUNTY, STATE OF UTAH, THE HONORABLE [illegible]
B. SORENSEN, JUDGE, PRESIDING

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IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-vs-	:	Case No. 15525
DENNIS BLAINE ANGUS,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with aggravated assault in violation of Utah Code Ann. § 76-5-103 (Supp. 1975).

DISPOSITION IN THE LOWER COURT

The case was tried before a jury on October 5, 1977, in the District Court of Utah County, the Honorable Allen B. Sorenson, presiding. The jury returned a verdict of guilty and the appellant was sentenced to a term not to exceed five years on the aggravated assault charge; because a firearm was used in the crime the court invoked the provision of Utah Code Ann. § 76-3-203(3) (Supp. 1977), and

imposed an additional sentence not to exceed five years, to run consecutively with the first.

RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmation of the verdict and of the judgments of the court below.

STATEMENT OF FACTS

On July 20, 1977, Clyde Davies was driving a truck southbound on I-15 near Santaquin, Utah, when a bullet pierced the door on the driver's side and struck his leg (T.9-11). He saw a highway patrol car about 60 yards away, stopped on the northbound berm; so Davies drove his truck to a spot opposite, where he pulled over and stopped. He then walked across the lanes of traffic to the patrol car, where he told Officer Mike Royce of the incident (T.17).

At about the same time Kent Child had a bullet strike the door of his vehicle, and as he turned in the direction of the shot, he saw a white van northbound (T.22). Dan Davidson testified that as he drove southbound on I-15, he heard a loud noise, like a tire blowing out, and observed a cream-colored van passing northbound on the interestate, adding that he saw no other traffic northbound in the immediate vicinity (T.36).

Mr. Child turned around, parked his car near the patrol car, and told Officer Royce about the white van (T.25). While Officer Royce took Mr. Davies to the hospital, Officers Sparks and Bradford received information about the suspect van and headed northbound in pursuit, stopping the appellant within five minutes of the shooting report (T.81), in his white van on the Payson off-ramp (T.41). In court, Officer Bradford identified appellant as the driver of the van (T.42).

The two officers ordered appellant from the van and Officer Bradford proceeded to search him (T.42). During the body search, appellant asked what the problem was and Officer Bradford told him he was in a suspect vehicle and that he would like to look in the van. Officer Bradford testified that appellant then said: "Go ahead. I will tell you anything you want to know or tell you where anything is if you want to know." (T.43). Appellant also reportedly told the officer that a .22 rifle and a .22 pistol were in there (T.43).

Officer Bradford entered the van and found a number of empty .22 shells in the driver's seat, a box half-full of ammunition on the console and more empty shells throughout the van. Just behind the passenger seat was a loaded .22 rifle and against the rear doors was a .22 partially loaded pistol (T.44).

Officer Royce thereafter found a spent casing in the northbound lanes near the Santaquin overpass (T.87).

Ballistics expert James Gaskill testified that all of the recovered casings were fired from appellant's .22 pistol, except for one fired from the rifle (T.105-107). He reached no conclusions about the origin of the bullet fragments taken from Mr. Davies' leg (T.106).

Appellant testified that he was "half-drunk" that evening and if he shot his weapons on the highway it would not have been intentional. Earlier that day he had been test-firing his guns (T.126).

ARGUMENT

POINT I

A. THE SEARCH OF APPELLANT'S VEHICLE WAS CONDUCTED PURSUANT TO APPELLANT'S CONSENT; THEREFORE, EVIDENCE OBTAINED DURING THE SEARCH WAS ADMISSIBLE AT TRIAL.

The circumstances of the search of appellant's vehicle demonstrate convincingly that appellant voluntarily consented to the search of his van by Officer Bradford. Pertinent testimony is documented at T.43, during the direct examination of the officer, after earlier questioning had established that Officer Bradford parked his vehicle behind appellant's van, ordered appellant out of his vehicle, and approached and searched appellant:

"A. When I was searching him he asked me what was going on. I told him he was in a suspect vehicle; that we would like to look in his van. He said, 'Go ahead. I will tell you anything you want to know or tell you where anything is if you want to know.'

Q. Did he tell you what was in the van?

A. Yes, he did.

Q. What did he say?

A. He said, 'There is a .22 rifle in there and there is a pistol, .22 pistol.'

Q. Did you in fact look into the van?

A. Yes, I did."

Officer Bradford then continued to describe the weapons and ammunition found inside the van. It must be emphasized that no objections to any of this testimony were made at trial nor does the record indicate any motion to suppress the evidence by defense counsel prior to trial. Thus, respondent contends that by failing to raise such objections or motions to the admission of the evidence found during the search, appellant waived the right to raise such objections now on appeal.

Nevertheless, the record--in particular Officer Bradford's testimony--provides no support for appellant's claim that he merely consented to the authority of the police to search and did not personally authorize the

search. Respondent submits that Bumper v. North Carolina, 391 U.S. 543 (1968), relied upon by appellant, is easily distinguished for in Bumper the Court held no genuine consent to a search can be given where the basis for the consent is an assertion by a law enforcement officer that he has a search warrant; therefore, the lawfulness of the search cannot be justified on the basis that the occupant consented.

Because appellant's consent was actual and not coerced in any manner by the investigating officers, the fruits of that search were properly admitted into evidence at trial.

B. AN ADDITIONAL BASIS FOR THE SEARCH WAS PROVIDED BY THE PROBABLE CAUSE TO STOP THE VAN IN CONJUNCTION WITH THE WARRANTLESS SEARCH EXCEPTION ALLOWED FOR MOVING VEHICLES.

Officer Royce testified (T.76) that after he escorted Mr. Davies to the patrol car, he waved Officer Sparks northbound, anticipating the direction the suspect vehicle had gone, based on an earlier report which had alerted him of another incident. The information provided by Mr. Child described the suspect vehicle as a northbound white van (T.40), one that Officer Sparks had observed just prior to Mr. Davies' report. The traffic that

evening was light, and appellant's van was the only white one in the vicinity (T.40). Approximately four minutes after the radio report to intercept a white van, Officer Sparks and Bradford made contact with the van, followed it for two miles (T.41), and pulled the van over on the Payson off-ramp (T.77).

Even without appellant's consent, respondent submits that the officer's search of the van and seizure of the weapons and ammunition was a valid search and seizure based on probable cause and justified by the exigent circumstances presented by a moving vehicle.

The probable cause was established by the particular enumerated facts--the description, the timing, the traffic light--which led police officers reasonably to believe that the shots had been fired from appellant's white van. The situation was critical; an unidentified driver of a white van had been taking pot-shots at passing vehicles, seriously endangering lives. All indications were that the shots had originated in appellant's van. To merely discuss the situation with appellant was insufficient and to release the vehicle and driver without a search unthinkable, as the high risk of further injury to other innocent travelers would not have been decreased if weapons remained in the van.

This Court discussed the tension between the right of a citizen to be free from unwarranted governmental interference and the need of law enforcement officers to perform their tasks conscientiously in State v. Criscola, 444 P.2d 517 (Utah 1968), at p. 517:

> ". . . But it is equally important that such protections do not become so extended beyond their reasons for being that even when there is no danger or likelihood of any such abuse, they provide a cloak of protection by which those engaged in criminal activities may escape detection and punishment. The essential thing is to keep within the reasonable middle ground, between the protecting of the law-abiding citizen from high-handed or officious intrusions into their private affairs; and the imposing of undue restrictions upon conscientious officers doing their duty in the investigation of crime."

On this basis, given the officer's probable cause, a search of the van was necessary. Under Carroll v. United States, 267 U.S. 132 (1925), and Chambers v. Maroney, 399 U.S. 42 (1970), the on-the-scene warrantless search which ensued was legal:

> "The measure of legality of such a seizure is, therefore, that the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported." 267 U.S at 155-156.

In the instant case, the suspected contraband was a loaded weapon, but the rationale is the same; as the Carroll Court noted, the search of an automobile on probable cause proceeds on a theory wholly different from that justifying a search incident to an arrest for:

> ". . .[t]he right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has that the contents of the automobile offend against the law." 267 U.S. at 158-159.

It is well settled that once probable cause is established to search a vehicle stopped on the highway, a search warrant is unnecessary. The Carroll Court observed that the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained. Seeing no difference between seizing and holding a vehicle for a warrant and searching the vehicle on the spot, the Court decided that given probable cause, either course is reasonable.

The Chambers' decision reinforced the Carroll principles, observing that the opportunity to search is fleeting since a car is readily movable. At 90 S.Ct. 1981, Footnote 9, the Court remarked:

> ". . .[f]ollowing the car until a warrant can be obtained seems an impractical alternative since, among other things, the car may be taken out of the jurisdiction. Tracing the car and searching it hours or days later would of course permit the instruments or fruits of crime to be removed from the car before the search."

Under this analysis, the highway patrol officers had a right--if not a duty--to search the suspect van for weapons, even if this Court were to find appellant's consent to the search defective.

Since the plain view doctrine might also justify this search (T.43), respondent urges that on any of these three bases, this Court find the warrantless search valid and the fruits therefrom admissible.

POINT II

THE ENHANCEMENT PROVISION OF UTAH CODE ANN. § 76-3-203 (SUPP. 1977), DOES NOT IMPOSE A DOUBLE PUNISHMENT FORBIDDEN BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Pertinent portions of Section 76-3-203 provide:

> "A person who has been convicted of a felony may be sentenced to imprisonment for an indeterminate term as follows:
>
> * * *
>
> (3) In the case of a felony of the third degree, for a term not to exceed five years but if the trier of fact finds a firearms or a facsimile or the representation of a firearm was used in the

> commission or furtherance of the felony, the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently."

This statute grants the court the discretionary power to impose on a felon a longer sentence if he used a firearm during the commission of a crime. In Utah and numerous other states having such a provision, the statute was the response of a legislature concerned with the dramatic increase in violent crimes and especially in the use of firearms to commit those crimes, greatly increasing the risk of injury or death to the victims. Respondent contends that an enhancement provision is not a double punishment; it is rather a punishment increased by the court when a firearm is used, adopted both as a method of deterring criminals from using these most deadly weapons and of punishing them more severely than others who commit the same crimes without using a firearm.

The cases cited by appellant on this point are readily distinguished. Ex Parte Lange, 18 Wall. 163, 21 L.Ed. 872 (1874), was a petition for a writ of habeas corpus, in which the petitioner complained that although he was convicted under an embezzlement statute which provided for imprisonment or fine as a punishment, he was both sentenced to prison and ordered to pay a fine.

The Court found this an illegal double punishment, in violation of the Fifth Amendment to the United States Constitution, which states that "no person shall for the same offense be twice put in jeopardy of life or limb. . . ."

United States v. Elwell, 383 U.S. 116 (1966), also mentions the Double Jeopardy clause in a case concerning narcotics convictions and retrials after reversals. The Court found that clause designed to prohibit double jeopardy as well as double punishment and "is not properly invoked unless the 'same offense' is involved in both the first and second trials." Id. at 124. The instant case simply does not involve two trials for one offense, but a lengthened sentence for using a firearm during one crime.

The third case relied upon by appellant also involved a retrial after the reversal of the first conviction. In North Carolina v. Pearce, 395 U.S. 711 (1969), the Court held that while the Double Jeopardy Clause is violated when punishment already exacted for an offense is not fully credited in imposing a new sentence after retrial on the same offense, the clause does not restrict the length of sentence upon reconviction;

and a more severe sentence may legally be imposed. Once again, it is the dissimilarities to the instant case which are noteworthy--not the similarities--which are limited to both cases being criminal, rather than civil.

Ex Parte Lange, 18 Wall. 163, 21 L.Ed. 872 (1874), provided considerable historial analysis of the Double Jeopardy Clause in observing the clear intent of the framers to be that in the area of double punishment that a man not be subject to a second punishment for the same offense for which he has already served a separate punishment. Since appellant was sentenced to only one punishment, admittedly made more severe because a firearm was used, respondent submits that no violation of the double punishment prohibition occurred.

POINT III

APPELLANT HAD CONSTRUCTIVE NOTICE OF THE UTAH ENHANCEMENT STATUTE; THEREFORE ITS INVOCATION BY THE TRIAL JUDGE WAS NOT A VIOLATION OF DUE PROCESS.

Appellant complains that he was never specifically informed of the existence of Utah Code Ann. § 76-3-203 (Supp. 1977), or of its possible application in his case, claiming that he may have plea bargained his way to a lesser penalty or a lesser crime. Not only is such mere speculation inappropriate here, but also a mistake of law is generally no defense. Utah Code Ann. § 76-2-304 (Supp. 1977), provides in pertinent part that: "(2) Ignorance or mistake concerning the existence or meaning of a penal law is no defense to a crime. A few limited exceptions, inapplicable under these facts, are then provided. Therefore, appellant and his attorney were on constructive notice of the statute's existence and a brief perusal of the Sentencing provisions of the Code would have easily detected the enhancement statute. Therefore, appellant, who used a firearm during his crime, was on notice that if convicted, § 76-3-203 might be applied.

By its language the enhancement statute is permissive, not mandatory. Consequently, its application is left to the discretion of the court, although it can act only

if a finding of firearm use has been made by the trier of fact. That is, of course, not determined until the verdict is returned; so the court's deliberative process begins after the conviction with a weighing of the facts of the case which support imposition of the more severe penalty and any mitigating facts which suggest that the judicial discretion not to invoke the enhancement statute ought to be exercised.

Therefore, there should have been no suprises at sentencing when Judge Allen B. Sorenson announced his intention to invoke the enhancement statute and tack onto appellant's initial 0-5 year sentence an additional 0-5 years, to run consecutively, for using a firearm to commit the aggravated assault. Respondent asserts that any actual surprise resulted from appellant's own negligence in failing to study sentencing options and provisions under the Utah Code before deciding to plead not guilty.

Oyler v. Boles, 368 U.S. 448, 82 S.Ct. 501 (1962), cited by appellant, does not support his position as that case concerned an habitual offender statute and the notice requirements applicable thereto. In finding there was a denial of due process, the Court said at 503-504:

> "Even though an habitual criminal charge does not state a separate offense, the determination of whether one is a habitual criminal is essentially independent of the determination of guilt on the underlying substantive offense."

However, in the instant case the decision whether or not the enhancement provision could be invoked rested totally on the findings of the jury that a firearm was used in this one crime, a finding necessary under the facts before a guilty verdict could be returned. Respondent, therefore, urges the court to find that appellant was amply accorded due process of the law.

POINT IV

THE RETURN OF A GENERAL GUILTY VERDICT IS A FINDING BY IMPLICATION THAT THE DEFENDANT USED A FIREARM, WHERE THE INFORMATION ALLEGED THAT THE DEFENDANT USED A FIREARM IN AN ATTEMPT TO DO BODILY INJURY.

The information against appellant excerpted below and made part of the Appendix, clearly shows that he was charged with using a firearm to commit an assault:

> ". . .charges that. . .Dennis Blaine Angus assaulted Clyde Davies by attempting, with unlawful force or violence, to do bodily injury to the said Clyde Davies by use of a deadly weapon, to wit: a firearm."

All of the state's evidence at trial concerned shooting reports, bullet holes in vehicles and in a person, retrieval of guns, ammunition, and bullet casings, and ballistic reports linking bullets with guns found in appellant's van. The only aggravated assault at issue was the one alleged to have been

committed by appellant by taking pot-shots at a passing vehicle. Instructions Four and Five, attached hereto as part of the Appendix, informed the jury of the elements of the charge with such specificity that a not guilty verdict was mandatory unless the jury found beyond a reasonable doubt that appellant had used a firearm as the deadly weapon. Although it is true that the jury did not return a special finding to that effect, the return of the guilty verdict was a finding by implication that appellant had committed the crime as charged; and that finding provided the basis for the court's invocation of the enhancement provision of Utah Code Ann. § 76-3-203 (Supp. 1977).

State v. Aberigo, 109 Ariz. 294, 508 P.2d 1156 (1973), supports this rationale and cited approvingly State v. Tosatto, 107 Ariz. 231, 485 P.2d 556 (1971). In the latter case the appellant was convicted of assault with a deadly weapon. The Arizona enhancement provision was invoked even though there had been no jury finding of use of a gun. Commenting that the evidence clearly showed that the defendant had pointed a pistol at the victim, firing it so it barely missed her head, the court held that "all that is necessary [to invoke an enhanced punishment] is that the evidence presented clearly indicates that the assault was committed by means of a gun." 485 P.2d 560.

While the Arizona case is directly on point, the California case cited by appellant is not. The facts of People v. Najera, 8 C.A. 3rd 504, 503 P.2d 1353 (1972), are considerably different. That defendant was charged with robbery and with being armed with a deadly weapon. The prosecution failed to request jury instruction on the use of a firearm under Section 12022.5 of the California Penal Code. The Court noted that an identical situation had arisen in People v. Spencer, 22 Cal. App. 3d 786, 99 Cal Rptr. 681, 691 (1972), where the Second District Court of Appeals had denied the People's request that the cause "be remanded to permit the People the opportunity to try to a jury the allegation that appellant 'used' a firearm within the meaning of Penal Code Section 12022.5." Approvingly citing Spencer at length, the California Supreme Court in Najera held that the People waived the application of Section 12022.5 by failing to ask for instructions on use of a weapon, as a jury's findings that a defendant is armed is not equivalent to a finding that a defendant used his weapon.

As the Najera case is not analogous to the instant case, respondent urges this Court to adopt the Arizona view that the court may invoke the enchanced punishment provision when the evidence clearly indicates that the convicted defendant used a firearm during the crime.

POINT V

UTAH CODE ANN. § 76-3-203 (SUPP. 1977), IS A SENTENCING PROVISION ONLY AND DOES NOT CREATE A NEW OFFENSE.

The Utah Legislature inserted the enchancement statute in the Punishments chapter of the Utah Code. Although appellant suggests that the legislature probably intended to create a new offense, respondent submits that placement in the Punishments chapter was more than fortuitous and that had a new offense been intended it would logically have been placed in one of the several Offenses chapters, especially Offenses Against the Person. Significantly, the legislature elected to place the enhancement statute in the Sentencing section of the Punishments chapter, indicating a clear intent that it be a sentencing provision only, not a new offense.

Numerous other states have considered this issue and have determined that no new crime is created. Among neighboring states so finding: Nevada [Raby v. Nevada, 574 P.2d 895 (1976)], California [People v. White, 129 Cal.Rptr. 769, 549 P.2d 537 (1976)], and New Mexico [State v. Barreras, 88 N.Mex 52, 536 P.2d 1108 (1975)].

Respondent acknowledges that the federal enchanced punishment provision of 18 U.S.C. § 924(c) has been construed as creating a separate offense that must be separately charged.

However, the language of the federal statute is dissimilar to the Utah statute, and courts finding that a separate federal offense was created have relied heavily on the legislative history and wording of the Act.

For convenience of comparison, the United States and Utah statutes are set out below:

> "(c) Whoever--
> (1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or
> (2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States, shall in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony." 18 U.S.C. § 924(c) (emphasis added).

> "Felony conviction--Indeterminate term of imprisonment--Increase of sentence if firearm used.--A person

> who has been convicted of a felony may be sentenced to imprisonment for an indeterminate term as follows:
>
> (1) In the case of a felony of the first degree, for a term at not less than five years and which may be for life but if the trier of fact finds a firearm or a facsimile or the representation of a firearm was used in the commission or furtherance of the felony, the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently;
>
> (2) In the case of a felony of the second degree. . .
>
> (3) In the case of a felony of the third degree. . .
>
> (4) Any person who has been sentenced to a term of imprisonment for a felony in which a firearm was used or involved in the accomplishment of the felony and is convicted of another felony when a firearm was used or involved in the accomplishment of the felony shall, in addition to any other sentence imposed, be sentenced for an indeterminate term to be not less than five nor more than ten years to run consecutively and not concurrently." Utah Code Ann. § 76-3-203 (in part).

After a lengthy analysis of the statute's legislative history, the court in United States v. Suddeth, 457 F.2d 1198, 1201 (10th Cir. 1972), concluded that a separate crime had been intended by Congress and made these pertinent observations:

> "If the subsection 924(c) is considered as a separate Act taken out of the context in which it was placed, it takes on the appearance of an ordinary provision defining a crime. As the wording is typical of such a definition, it is perhaps unusual to take such a subsection out of context, but we think it should be done because it is in fact a stranger where it is placed. It is apparent also that the language in the subsection making the crime dependent upon the proof of another crime is unusual, but again it does not necessarily convert it into merely an increase in the penalty for the basic crime. This aspect does not overcome the other indications of the construction of the subsection as an independent crime.
>
> Perhaps the strongest single phrase in the subsection to indicate it is a separate crime is the reference to '. . .subsequent convictions under this subsection . . .' This, of course, is typical of a definition of a separate crime and provisions relating to the increase in punishment upon the second or third conviction thereof."

While it was therefore reasonable and proper to hold that 18 U.S.C. §924(c) created a separate federal crime, respondent submits that the language and placement of the Utah statute just as clearly leads to a conclusion that §76-3-203 is a punishment provision only, which allows a court to impose a more severe sentence on a convicted felon who used

a firearm during the commission of the crime, as a recognition of the great, immediate potential for serious bodily harm that is unique to firearms and which set guns apart from knives, chains, or baseball bats.

CONCLUSION

Because the guns and ammunition were legally seized following appellant's consent to the search and/or under the moving vehicle exception to the warrant requirement, and Utah Code Ann. § 76-3-203 (Supp. 1977), is a valid exercise of legislative power to punish more severely persons who use firearms to commit felonies, respondent urges this Court to affirm the verdict and judgment of the court below.

Respectfully submitted,

ROBERT B. HANSEN
Attorney General

EARL F. DORIUS
Assistant Attorney General

Attorneys for Respondent

APPENDIX

IN THE DISTRICT COURT

in and for the

FOURTH JUDICIAL DISTRICT OF THE STATE OF UTAH

COUNTY OF UTAH

THE STATE OF UTAH,

Plaintiff,

vs.

DENNIS BLAINE ANGUS

Defendant.

Criminal No. 6704

INFORMATION

NOALL T. WOOTTON, County Attorney for Utah County, State of Utah,

accuses DENNIS BLAINE ANGUS

of violating the provisions of section 76-5-103, Utah Criminal Code, a Felony of the Third Degree,

and charges that on or about the 20th day of July A.D. 19 77, at Utah County, State of Utah, the said DENNIS BLAINE ANGUS assaulted Clyde Davies by attempting, with unlawful force or violence, to do bodily injury to the said Clyde Davies by use of a deadly weapon, to-wit: a firearm.

NOALL T. WOOTTON
Utah County Attorney
State of Utah

The following witnesses were examined upon preliminary hearing before the committing magistrate.

J. GORDON KNUDSEN

For the Plaintiff:
Clyde Davies
Kent Child
Bob Eyre

For the Defendant:

None

Estimated time for Trial: one day

Noall Wootton

Instruction No. 4

This is a criminal action brought by the State of Utah against the defendant in which he is accused by the information of the commission of a felony. The charging part of the information is as follows:

"That on or about the 20th day of July A.D., 1977, at Utah County, State of Utah, the said Dennis Blaine Angus assaulted Clyde Davies by attempting, with unlawful force or violence, to do bodily injury to the said Clyde Davies by use of a deadly weapon, to-wit: a firearm."

When the defendant was arraigned upon this charge he entered a plea of not guilty, which plea casts upon the State the burden of proving beyond a reasonable doubt the essential elements of the crime charged as set forth in Instruction No. 5.

Instruction No. 5

The essential elements of the crime charged in the information are as follows:

1. That the defendant made an aggravated assault upon the person of Clyde Davies.

2. That such assault, if any, was made with a deadly weapon in the hand of the defendant.

3. That such assault, if any, was made or or about July 20, 1977, at Utah County, Utah.

If the evidence has failed to prove to your satisfaction beyond a reasonable doubt any of the essential elements set forth above, then the defendant is not guilty of the crime charged. But if the evidence does prove to your satisfaction beyond a reasonable doubt each and all of the essential elements set forth above, then the defendant is guilty of the crime charged.