

1978

State of Utah v. Kenneth J. Gandee : Brief of Respondent

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. Ronald W. Perkins; Attorney for Appellant

Recommended Citation

Brief of Respondent, *Utah v. Gandee*, No. 15635 (Utah Supreme Court, 1978).
https://digitalcommons.law.byu.edu/uofu_sc2/1073

This Brief of Respondent 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.

IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent, :

-vs-

KENNETH J. GANDEE,

Defendant-Appellant.

RESPONDENT'S
APPELLANT'S

RONALD W. PERKINS

Legal Forum Building
2447 Kiesel Avenue
Ogden, Utah 84401

Attorney for Appellant

TABLE OF CONTENTS

	PAGE
STATEMENT OF THE NATURE OF THE CASE -----	1
DISPOSITION IN THE LOWER COURT -----	1
RELIEF SOUGHT ON REHEARING -----	1
STATEMENT OF FACTS -----	2
ARGUMENT	
POINT I: THE COURT CORRECTLY DECIDED THE CASE AND APPELLANT'S PETITION FOR REHEARING SHOULD BE DENIED -----	2
POINT II: CARRYING A LOADED FIREARM IN VEHICLE OR ON STREET, UTAH CODE ANN. § 76-10-505 IS NOT A LESSER INCLUDED OFFENSE OF CARRYING A CONCEALED WEAPON, UTAH CODE ANN. § 76-10-504 -----	3

CASES CITED

Cummings v. Nielson, 42 U. 157, 129 P. 619 (1913) -----	2
In Re McKnight, 4 U. 237, 9 P. 299 (1886) -----	3

STATUTES CITED

Utah Code Annotated § 76-10-504 (1953, as amended) -----	3
Utah Code Annotated § 76-10-505 (1953 as amended) -----	3, 4
Utah Code Annotated § 77-33-6 (1953) -----	3

IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH, :
Plaintiff-Respondent, : RESPONDENT'S BRIEF IN
-vs- : OPPOSITION TO APPELLANT'S
KENNETH J. GANDEE, : PETITION FOR REHEARING
Defendant-Appellant. : Case No. 15635

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Reference is made to the statement of the nature of
the case in Respondent's brief and incorporated herewith.

DISPOSITION IN THE LOWER COURT

Reference is made to the disposition in the lower
court in Respondent's brief and incorporated herewith.

RELIEF SOUGHT ON REHEARING

Respondent seeks an order of the Court denying
appellant's petition for rehearing.

STATEMENT OF FACTS

Reference is made to the statement of facts in Respondent's brief and incorporated herewith.

ARGUMENT

POINT I.

THE COURT CORRECTLY DECIDED THE CASE
AND APPELLANT'S PETITION FOR RE-
HEARING SHOULD BE DENIED.

This Court in the instant case correctly analyzed the facts and the law and reached a sound decision. Appellant's petition for rehearing presents no new arguments nor any new facts which could alter the Court's ruling.

In Cummings v. Nielson, 42 U. 157, 129 P. 619 (1917) a contract case in which a petition for rehearing was filed and rejected, Justice Frick noted in a concurring opinion that

"To make an application for a rehearing is a matter of right, and we have no desire to discourage the practice of filing petitions for rehearings in proper cases. When this court, however, has considered and decided all of the material questions involved in a case, a rehearing should not be applied for, unless we have misconstrued or overlooked some material fact or facts, or have overlooked some statute or decision which may affect the result, or that we have based the decision on some wrong principle of law, or have either misapplied or overlooked something which materially affects the result. In this case, nothing was done or attempted by counsel, except to reargue the very propositions we had fully considered and decided."
129 P. at 624

This Court also held in In Re McKnight, 4 U. 237, 9 P. 299 (1886), that to justify a rehearing a "strong case must be made."

Appellant's petition for rehearing does not present anything new. It does not make a strong case. Appellant merely reargues and reiterates arguments made in his original brief.

POINT II.

CARRYING A LOADED FIREARM IN
VEHICLE OR ON STREET, UTAH CODE
ANN. § 76-10-505 IS NOT A LESSER
INCLUDED OFFENSE OF CARRYING A
CONCEALED WEAPON, UTAH CODE ANN.
§ 76-10-504.

Utah Code Ann. § 77-33-6 (1953) provides:

"The jury may find the defendant guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment or information, or of an attempt to commit the offense."

Carrying a loaded firearm in a vehicle or on a street, Utah Code Ann. § 76-10-505 is not necessarily included in carrying a concealed weapon, Utah Code Ann. § 76-10-504. In order to be convicted of a third degree felony for the latter, one must (1) carry a concealed dangerous weapon and (2) the dangerous weapon must be a firearm or sawed-off shotgun. The

statute's primary concern is concealment. To be convicted of the former, one must (1) carry a loaded firearm (2) in a vehicle, on a public street in an incorporated city, or in a prohibited area of an unincorporated territory. The primary concern of this statute is the condition of the firearm and location.

If a person were carrying an unloaded firearm in an area where one could legally carry a firearm but the firearm was concealed, that person could be convicted of carrying a concealed weapon. It would be impossible to convict that person of carrying a loaded firearm in a vehicle or on a street because the necessary elements of a loaded firearm and a prohibited place are absent. The latter is not necessarily included in the former. Appellant's request for an instruction on § 76-10-505, supra, was properly rejected and appropriately withdrawn. This Court correctly decided the issue and appellant's conviction should be affirmed.

Respectfully submitted,

ROBERT B. HANSEN
Attorney General

CRAIG L. BARLOW
Assistant Attorney General

Attorneys for Respondent