

1988

Jeff Q. Tucker v. Deon N. Dove : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS

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880350-CA IN THE COURT OF APPEALS
-Y NO. OF THE STATE OF UTAH

JEFF Q. TUCKER, :
Plaintiff-Respondent, : Case No. 880350-CA
vs. :
DEON N. DOVE, dba :
DOVE'S HAPPY SERVICE, :
a corporation, BENITO M. VAN, :
and JOHN DOES 1 through 10, : Category 14b
Defendants-Appellants. :

APPELLANTS' BRIEF

APPEAL FROM THE JUDGMENT ENTERED
BY THE SEVENTH JUDICIAL DISTRICT COURT
OF DUCHESNE COUNTY, STATE OF UTAH,
THE HONORABLE DENNIS L. DRANEY PRESIDING

FRED D. HOWARD and
LESLIE W. SLAUGH, for:
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FILED

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COURT OF APPEALS

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APPELLANTS' BRIEF

JURISDICTION AND NATURE OF PROCEEDINGS BELOW

This is an appeal from a judgment entered after a non-jury trial. The Utah Supreme Court had jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2-2(3)(i) (1987), and transferred the case to this Court pursuant to Utah Code Ann. § 78-2-2(4). This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(h).

ISSUES PRESENTED

1. Were the findings of the District Court internally inconsistent, where the court found that defendant Benito Van had probable cause to suspect plaintiff of shoplifting and therefore to detain him, yet found that Mr. Van did not have probable cause to sign a criminal citation alleging that plaintiff had shoplifted?

2. Was the plaintiff entitled to an award of pre-judgment interest on the general damage award for humiliation?

RELEVANT STATUTES

The provisions of Utah Code Ann. §§ 76-6-404 (1978), 76-6-602 (Supp. 1988), 76-6-603 (Supp. 1988), 76-6-604 (Supp. 1988), and 77-7-14 (1982, amended by 1987 Utah Laws ch. 245, § 10), regarding retail theft and detention and arrest of suspected violators, are set forth in Appendix "A".

STATEMENT OF THE CASE

A. Nature of the Case.

This is a tort action for damages alleged to have been suffered by plaintiff when he was detained and accused of shoplifting by defendants and subsequently arrested based on defendants' complaint.

B. Course of Proceedings and Disposition Below.

This action was filed on May 23, 1986 (R. 1), and was tried before The Honorable Dennis L. Draney, sitting without a jury, on September 15, 1987. (R. 144, 168). The trial court issued a Ruling (R. 101-02) on September 22, 1987, determining the issues substantially in favor of plaintiff, and formal Findings of Fact and Conclusions of Law (R. 138-43) and a Judgment (R. 144-45) were entered on February 1, 1988.

An Order for Extension of Time to Appeal was entered by the court on March 7, 1988. (R. 154.) Defendants' Notice of Appeal

was filed on March 28, 1988 (R. 156) and plaintiff's Notice of Cross-Appeal was filed on April 15, 1988.¹ (R. 165.)

C. Statement of Facts.

On November 19, 1985, plaintiff and three of his friends entered Dove's Happy Service, a retail grocery store in Roosevelt, Utah, which is owned and operated by Deon N. Dove. (R. 227, 229, 372.) Conflicting evidence was offered concerning what happened in the store. A security guard employed by Mr. Dove, Benito M. Van, testified that he was on a "catwalk" above the store floor at the time the boys entered the store. He observed plaintiff open a package for a television cable splitter, and then remove and conceal the splitter in his pocket. (R. 391.) Mr. Van left the catwalk to go to the store floor to apprehend plaintiff, and was unable to view plaintiff's actions for a period of time. (R. 391-92.) Upon reaching the store floor, he was stopped by and talked for several minutes with an acquaintance, James Wymer, who was one of the friends who had come in with plaintiff. (R. 292-96; 392.) The boys congregated at a magazine rack and prepared to leave. (R. 392.) Mr. Van apprehended plaintiff and one of his companions, Toby Clark, just before the boys left the store. (R. 393.)

Plaintiff and his friends testified that they had entered

¹Appellant has filed herewith a Motion to Dismiss asserting that the cross-appeal was untimely. R. Utah S. Ct. 4(d).

the store for the purpose of purchasing some speaker wire.² They proceeded to the aisle containing electrical parts, but en route James Wymer met and stopped to talk with Mr. Van. (R. 232, 295-96.) The remaining three boys went down the aisle containing electrical parts and began to look for speaker wire. The boys' testimony was inconsistent as to whether they could see Mr. Van, or Mr. Van see them, while they were down the aisle. (E.g., R. 255, 259, 301, 306.) The boys all agreed that the TV splitter package was already open, and that plaintiff removed the splitter, inspected it for a while, left the now empty package on the shelf, and discarded the splitter on another shelf at the end of the aisle. (R. 233-35, 325-26, 352-53, 360.)

All parties agreed that Mr. Van approached the boys at the front of the store, and plaintiff and one of his friends, who had been in close proximity to plaintiff when the events surrounding the cable splitter occurred, willingly complied with Mr. Van's request that they accompany him to a room at the rear of the store. (R. 238, 263-65.) Mr. Van and a store manager told the two boys they were suspected of shoplifting, and the boys denied the accusations and offered to allow themselves to be searched. (R. 240.) Mr. Van and the manager stated that they would summon the police to perform a search. (Id.) The

²The complaint alleged that they had entered the store for the purpose of inspecting a "switch" which he wanted, and that plaintiff did inspect a "switch" box which he discovered to be empty. (R. 2.) The complaint was amended at trial to alleged that one of plaintiff's friends was seeking speaker wire. (R. 378, 489.)

police were summoned and searched plaintiff and his friend, but failed to locate the cable splitter. (R. 241.) Mr. Van identified plaintiff as the individual who had pocketed the item, and the friend was allowed to leave. (R. 241.) Mr. Van signed a citation issued by the police which charged plaintiff with shoplifting (R. 368-70) and plaintiff was placed under arrest. (R. 241-42, 364-65.) Plaintiff was escorted by two police officers outside the store, handcuffed, taken to the police station, booked, and jailed. (R. 241-45.) He was released from jailed upon his mother posting bail of \$106.00. (R. 245.)

Plaintiff acknowledged that Mr. Van's and the store manager's treatment of him was civil and courteous at all times. (R. 263-65; see also R. 395-96.)

After plaintiff had been arrested and had left the store, Mr. Van discovered the cable splitter concealed behind packages of potato chips at the end of the aisle, and delivered the splitter to the police (R. 394.)

The criminal charges against plaintiff were dismissed upon plaintiff's motion. (R. 56, 176-77, 249.) Plaintiff testified that he paid \$750.00 to his attorney for representation in the criminal matter. (R. 249.)

SUMMARY OF ARGUMENT

By finding that defendants had probable cause to detain and cause the search of the plaintiff, the trial court implicitly accepted the testimony of defendant Benito Van over that of the

plaintiff. The accounts of the parties are polarized. The trial court believed the testimony of Mr. Van, who described plaintiff's removal of the splitter from its package and his placing it in his pocket. The detention and subsequent arrest of the plaintiff are inseparably connected acts, and separate standards for probable cause do not apply. Rather, when probable cause exists to believe that the crime of retail theft has occurred, such probable cause extends both to detention and to arrest.

Even if detention and arrest are considered separately, probable cause existed for plaintiff's arrest as a matter of law. The mere taking or concealing of store property, such as witnessed by Mr. Van, is sufficient to constitute the crime of retail theft. It is irrelevant whether the store property was found on plaintiff's person or in its secreted location prior to the arrest. The trial court erred in holding that probable cause existed for the detention but did not also exist for the arrest.

If the decision of the trial court is affirmed as to civil liability, then the award of prejudgment interest must be reversed. A general damages award for humiliation or false arrest is not one which can be calculated with mathematical accuracy and prejudgment interest is not allowable for such an award.

ARGUMENT

POINT I

THE TRIAL COURT'S RULING IS INTERNALLY INCONSISTENT.

The trial court ruled that defendants "were without probable cause to take any action beyond the initial detention and search" (R. 102, 142), and thereby implicitly held that defendants had sufficient cause for the initial detention and search. These rulings are inconsistent as a matter of law. It appears from the record that the bases for the trial court's ruling were the trial court's erroneous determination of two issues. First, the trial court apparently concluded that only reasonable cause was required for the initial detention and search, whereas probable cause was required for the arrest. (R. 216-24, 476.) Second, the trial court concluded that finding the allegedly stolen item on the plaintiff's person was a prerequisite to the existence of probable cause. (R. 102.)

A. Detention and Arrest are Inseparably Connected and Probable Cause for One is Necessarily Probable Cause for the Other.

Where, as in the present case, a dispute exists as to the principal facts in a shoplifting case, the determination of reasonableness and probable cause, which are requisite for the statutory protection against false arrest charges, is primarily a question of fact to be resolved by the finder of fact. Terry v. Zions Coop. Mercantile Inst., 605 P.2d 314, 320-21 (1979),

modified, 617 P.2d 700 (Utah 1980). Accord Draeger v. Grand Cent., Inc., 504 F.2d 142, 144 (10th Cir. 1974).

By finding that Benito Van had probable cause to detain and cause the search of the plaintiff, the trial court implicitly accepted the testimony of Benito Van as to the events which occurred in the store.³ Jordon v. Mangel Stores, 336 S.2d 278, 279 (La. App. 1976) (where trial court found that defendants were reasonably justified in detaining and arresting plaintiff, it therefore must have been unable to accept plaintiff's testimony of the events surrounding the alleged shoplifting). Probable cause to detain and cause a search of the plaintiff necessarily is probable cause for the arrest of the plaintiff. The trial court implicitly found there was probable cause to believe plaintiff had committed retail theft. With this probable cause, defendants were authorized by Utah law to detain the plaintiff in a reasonable manner and surrender him to the police, which is precisely what they did. (R. 238-42.)

Any merchant who has probable cause to believe that a person has committed retail theft may detain such person, on or off the premises of a retail mercantile establishment, in a reasonable manner and for a reasonable length of time for all or any of the following purposes:

³No other conclusion could reasonably be made from the evidence presented. Although plaintiff and his friends testified that Benito Van was unable to see them at the time the concealment of store property allegedly took place (R. 262, 305-06, 338), the testimony is inherently unbelievable. It would be unreasonable to believe that Mr. Van would have stopped the boys and accused plaintiff of shoplifting if he had not been watching the boys and if had he not seen plaintiff remove the splitter from its package.

. . . .

(5) To inform a peace officer of the detention of the person and surrender that person to the custody of a peace officer[.]

Utah Code Ann. § 76-6-603 (Supp. 1988).

Nowhere in the Utah statutes or case law are separate standards applied for arrest and detention in shoplifting. The standard of "reasonable and probable cause to believe the person committed a theft of goods" is applied to both detention and arrest:

A peace officer, merchant, or merchant's employee, servant, or agent who causes the detention of a person as provided in § 77-7-12, or who causes the arrest of a person for theft of goods held or displayed for sale shall not be criminally or civilly liable where he has reasonable and probable grounds to believe the person detained or arrested committed a theft of goods held or displayed for sale.

Utah Code Ann. § 77-7-14 (1982, amended by 1987 Utah Laws ch. 245, § 10)⁴(emphasis added). A merchant may use probable cause as a defense not only against actions arising out of the detention of a suspected shoplifter (such as unlawful detention or false imprisonment), but also against actions arising out of the arrest of the suspected shoplifter as well (such as false arrest).

In any action for false arrest, false imprisonment, unlawful detention, defamation

⁴The 1987 amendment changed the phrase "reasonable and probable grounds" to "reasonable and probable cause" and made some stylistic changes. Utah Code Ann. § 77-7-14(1) (Supp. 1988).

of character, assault, trespass, or invasion of civil rights brought by any person detained by the merchant, it shall be a defense to such action that the merchant detaining such person had probable cause to believe that the person had committed retail theft and that the merchant acted reasonably under all circumstances.

Utah Code Ann. § 76-6-604 (Supp. 1988) (emphasis added).

The trial court found that Benito Van had probable cause to detain the plaintiff. Mr. Van watched the plaintiff remove an item from a store display and conceal that item in his pocket. (R. 391.) This act gave rise to a reasonable and probable cause for Benito Van to believe that plaintiff had committed a theft of goods displayed for sale. Section 77-7-14 provides that when such a reasonable and probable cause exists, and the suspected person is detained and arrested, there is no civil liability on the part of the merchant. The standard of reasonable and probable cause is not bifurcated, rather it is the same for arrest as for detention.

B. Even if Detention and Arrest are Considered Separately, Probable Cause for Arrest Existed as a Matter of Law.

The Utah Supreme Court has repeatedly held:

that an item need not be taken from a retailer's premises to constitute the crime of theft, but that a defendant's acts of exercising unauthorized control over an item within a retail establishment was sufficient.

State v. Watts, 639 P.2d 158, 162 (Utah 1981). Accord State v. Eagle, 611 P.2d 1211 (Utah 1980); State v. Bender, 581 P.2d 1019 (Utah 1978).

When Benito Van witnessed the plaintiff remove an item from the store shelf and secret it in his pocket, Mr. Van then had reasonable and probable cause to believe that a crime had been committed.⁵ It is irrelevant that the item was not found on the plaintiff's person when he was detained and searched or that the item was not found in its place of concealment in the store until after the citation was signed. It is not necessary for an individual to be successful in his attempt at shoplifting in order to have committed a crime.

The fact that defendant was unable to escape undetected is of no consequence, for escape is not a necessary element of the crime of theft. Nor is he to be absolved of guilt by his abandonment of the loot anymore than would a bank robber, burglar, or other law-breaker, who throws away, or otherwise abandons, the fruits of his crime.

State v. Eagle, 611 P.2d 1211, 1213 (Utah 1980).

Utah Code Ann. § 76-6-602 (Supp. 1988) provides that:

A person commits the offense of retail theft when he knowingly:

(1) takes possession of, conceals, carries away, transfers or causes to be carried away or transferred, any merchandise displayed, held, stored or offered for sale in a retail mercantile establishment with the intention of retaining such merchandise or with the intention of depriving the merchant permanently of the possession, use or benefit of

⁵The analysis set forth in this Point applies even if the plaintiff's witnesses are believed. The plaintiff admitted to removing the splitter from its package and carrying it away some distance from where it had been located. Although a prosecutor in his or her discretion may choose not to prosecute such a case, probable cause to believe a crime was committed nonetheless existed at the point that plaintiff proceeded to walk away with the splitter.

such merchandise without paying the retail value of such merchandise;

(Emphasis added.)

This section, while enacted specifically to cover shoplifting, does not supercede § 76-6-404 (1978) which, prior to the enactment of § 76-6-602, covered shoplifting. It provides that a "person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof." In applying this statute, the Utah Supreme Court held in State v. Walker, 649 P.2d 16, 17 (Utah 1982), that a person could be found guilty "without ever finding that he 'obtained' the property, so long as he exercised unauthorized control thereof." In the present case, the trial court concluded that "having found no property of the store on plaintiff's person or where it could have been placed by plaintiff, until after the citation was signed and the arrest made, defendants were without probable cause to take any action beyond the initial detention and search." (R. 102.) This conclusion is erroneous since Mr. Van had probable cause to believe that the plaintiff had committed retail theft. It was not necessary to find the store's property on the plaintiff, or in its secreted location, in order to establish the probable cause. Benito Van witnessed the act of retail theft, and therefore had probable cause to sign the arrest citation.

Clearly, the most significant aspect of these [modern shoplifting] statutes, from the merchant's standpoint, is that the propriety, if not the legality, of the arrest, is no longer dependent upon a

finding, either in the false imprisonment action or in a criminal proceeding for shoplifting, that the suspect was actually guilty of the offense.

Annot., Construction and Effect, In False Imprisonment Action, of Statute Providing for Detention of Suspected Shoplifters, 47 A.L.R. 3d 998, 1005 (1973) (emphasis added).

In Jordon v. Mangel Stores, 336 S.2d 278 (La. App. 1976), a factually similar case applying Louisiana's shoplifting statutes, which are similar to the Utah statutes, a store security guard saw the plaintiff break open a socket wrench set and remove one of the sockets. The plaintiff apparently saw the guard watching him, because he concealed the socket and began to walk toward the front of the store. The security guard pursued the plaintiff, but was unable to catch up until the plaintiff was almost out of the store. The guard stopped the plaintiff at the door and took him to the store office, where he was searched. The socket was not found on plaintiff's person. The plaintiff denied the shoplifting accusation, even denying that he went into the hardware department of the store. Plaintiff was then formally arrested and was later tried on the charges and acquitted. Jordon at 279.

The Jordon court held that it was clear from the record that if the store guard's testimony in the civil case was accepted, the defendants had probable and reasonable cause for both the detention and the arrest. The court reached this decision without stating whether or not the socket was ever found, which demonstrates that the court considered this

information to be unnecessary. The court went on to note that if the plaintiff's testimony was accepted, there could be no such reasonable cause. Id. at 279-80. The court found that since the trial court held that defendants were reasonably justified in their actions, they must therefore have been unable to accept the plaintiff's testimony. Id. at 280.

The facts of the present case are very similar to Jordon with the exception that the trial court did not find that Benito Van had probable cause to sign the arrest citation, although he did have probable cause to detain and search the plaintiff. This probable cause existed because Mr. Van reasonably believed plaintiff committed an act of retail theft. Following the Jordon court analysis, the defendants in the present case should have no civil liability for the detention and arrest of a suspected shoplifter when the act of shoplifting was witnessed by a store employee, regardless of whether the store item was found on the alleged shoplifter's person.

Further reinforcing the principle that removing and concealing an item constitutes theft is the common law crime of larceny. An element of common law larceny is asportation which is "[t]he removal of things from one place to another." Black's Law Dictionary 105 (5th Ed. 1979). "Because larceny is complete upon the asportation, however slight, of another's property, the mere taking of a displayed item and concealing it, with the requisite intent, would be sufficient to support a conviction for larceny." Utah Legislative Survey - 1979, Retail Theft,

1980 Utah L. Rev. 193, 195 n. 253, citing, W. LaFave & A. Scott, Criminal Law 622, 631-32 (1972).

Utah Code Ann. § 76-6-602 (Supp. 1988) requires, in addition to concealment, that there be an intention to deprive the merchant permanently of the possession of the merchandise in order for the crime of retail theft to have been committed. Removing an item from the store without paying the retail value would be conclusive evidence of intent; however, such removal is not required. Under Colorado's shoplifting statutes, it has been held that "concealment of goods is prima facia evidence of the intent to commit the crime of theft." Gonzales v. Harris, 34 Colo. App. 282, 528 P.2d 259, 262-63 (1974), rev'd on other grounds, 189 Colo. 518, 542 P.2d 842 (1975). Moreover, the Utah Supreme Court has held that:

even if the crime was not in fact being committed or attempted, if the defendant, in good faith believes that such facts are present as to lead him to an honest conclusion that a crime is being committed by the person to be arrested, then he may not be held liable for false arrest.

Terry, 605 P.2d at 320.

In State v. Barber, 747 P.2d 436 (Utah App. 1987), Barber appealed his conviction of retail theft. The facts of the case reveal that a store security guard had witnessed Barber directing his son to conceal a package, which was later discovered to contain a video recorder. One of the issues on appeal was whether a theft of that recorder in fact occurred since it was never removed from the store, but was merely concealed on the

premises. Id. at 437-38. In affirming Barber's conviction of retail theft, the Utah Court of Appeals stated:

On the issue of his intent, Barber chooses to ignore that, under our statute, theft is committed by taking possession, concealing, transferring or causing to be carried away or transferred, any merchandise. The fact that the recorder was not "carried away" out of the store makes no difference. There is ample evidence to support the conclusion that Barber directed the taking and hiding of the recorder -- acts sufficient to constitute concealment or transfer under the statute -- with the intent to permanently deprive ZCMI of it.

Id. at 440. Mr. Van watched the plaintiff remove an item from its package and conceal it in his pocket. This act is sufficient to give rise to the honest conclusion that plaintiff intended to deprive the store of its property, and therefore, that a crime had been committed.

The trial court correctly implicitly found that defendants had probable cause to suspect that plaintiff had committed the crime of retail theft, and that defendants could not, therefore, be held civilly liable for detaining and causing the search of the plaintiff. However, the trial court erred in finding that the probable cause which defendants had, did not extend to signing the criminal citation.

POINT II

AN AWARD OF PRE-JUDGMENT INTEREST IS IMPROPER.

Defendants are protected from civil liability in the present case by the Utah Retail Theft Act. However, if this

Court affirms the civil damages award of the trial court, the award of prejudgment interest is improper. In the final judgment of the trial court in the present case, entered on February 1, 1988, an award of pre-judgment interest was granted. (R. 145.) The damages award given to plaintiff was based upon the "humiliation" caused by the arrest. (R. 102, 145.) In such a case as this, where the amount of a loss cannot be calculated with mathematical accuracy, an award of prejudgment interest is never proper.

Prejudgment interest may be awarded in a case where the loss is fixed as of a particular time and the amount of the loss can be calculated with mathematical accuracy.

Jorgensen v. John Clay & Co., 660 P.2d 229, 233 (Utah 1983) (citations omitted).

There are numerous examples in Utah case law of situations in which an amount of loss can be calculated with mathematical accuracy and, therefore, a prejudgment interest award is appropriate. See, e.g. Golden Key Realty v. Mantas, 699 P.2d 730 (Utah 1985) (liquidated damages on accord and satisfaction of exclusive real estate listing agreement); Bennion v. State Bd. of Oil, Gas & Mining, 675 P.2d 1135 (Utah 1983) (mineral royalties owed); Christenson v. Commonwealth Land Title Ins. Co., 666 P.2d 302 (Utah 1983) (negligent acknowledgment of document by escrow agent). However, in cases that involve damages for things such as mental anguish or punitive damages,

the Utah Supreme Court has held that prejudgment interest is inappropriate.

As to the awards for mental anguish and punitive damages, however, prejudgment interest is inappropriate [The] rule clearly precludes prejudgment interest on the court's mental anguish and punitive damages awards, which were not fixed or ascertainable before the time of trial.

First Sec. Bank of Utah v. J.B.J. Feedyards, Inc., 653 P.2d 591, 600 (Utah 1982). A damages award for humiliation is of the same character as damages for mental anguish. In each case, no amount of loss can be mathematically calculated. Moreover, it has been held that damages, in general, for actions involving restraint of a person, such as false imprisonment or false arrest, are not mathematically calculable. Therefore, they do not give rise to an award for prejudgment interest.

[T]he amount of money which will compensate one for an unwarranted restraint of his person cannot realistically be the subject of exact computation. The question involves such emotions as humiliation, shame and public disgrace, which are not capable of calculable qualification.

Town of Jackson v. Shaw, 569 P.2d 1246, 1251 (Wyo. 1977). In the present case, an award of prejudgment interest clearly is error.

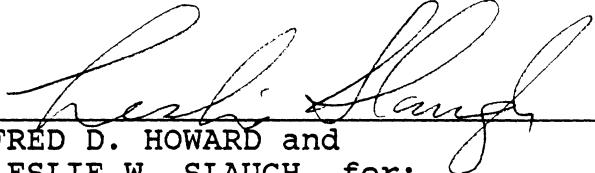
CONCLUSION

When probable cause exists to believe that the crime of retail theft has occurred, such probable cause applies both to the detention and to the arrest of the suspect. Even if detention and arrest are considered separately, however, in the

present case probable cause existed for the arrest as a matter of law. The trial court erred in holding that probable cause existed for the detention but did not also exist for the arrest. The decision of the trial court that probable cause existed for the detention and search be affirmed, but the decision that probable cause did not exist for actions beyond the detention and search should be reversed. The judgment in favor of plaintiff must accordingly be reversed, and the case remanded with instructions to enter judgment of no cause of action.

If the decision of the trial court is affirmed as to liability, the award of prejudgment interest is inappropriate and should be reversed since the damages award is not one which can be calculated with mathematical accuracy.

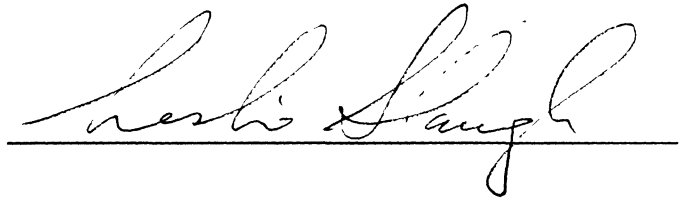
DATED this 1st day of September, 1988.


FRED D. HOWARD and
LESLIE W. SLAUGH, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Defendants-
Appellants

MAILING CERTIFICATE

I hereby certify that four true and correct copies of the foregoing were mailed to the following, postage prepaid, this 1st day of September, 1988.

Mr. George E. Mangan
Attorney for Respondent
Box AE
Ashton, Idaho 83420

A handwritten signature in cursive script, appearing to read "Leslie Laugh", is written over a horizontal line.

APPENDIX "A"

STATUTES

Utah Code Ann. § 76-6-404 (1978). Theft--Elements.

A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.

Utah Code Ann. § 76-6-602 (Supp. 1988). Retail theft, acts constituting.

A person commits the offense of retail theft when he knowingly:

(1) Takes possession of, conceals, carries away, transfers or causes to be carried away or transferred, any merchandise displayed, held, stored or offered for sale in a retail mercantile establishment with the intention of retaining such merchandise or with the intention of depriving the merchant permanently of the possession, use or benefit of such merchandise without paying the retail value of such merchandise; or

(2) Alters, transfers, or removes any label, price tag, marking, indicia of value or any other markings which aid in determining value of any merchandise displayed, held, stored or offered for sale, in a retail mercantile establishment and attempts to purchase such merchandise personally or in consort with another at less than the retail value with the intention of depriving the merchant of the retail value of such merchandise; or

(3) Transfers any merchandise displayed, held, stored or offered for sale in a retail mercantile establishment from the container in or on which such merchandise is displayed to any other container with the intention of depriving the merchant of the retail value of such merchandise; or

(4) Under-rings with the intention of depriving the merchant of the retail value of the merchandise; or

(5) Removes a shopping cart from the premises of a retail mercantile establishment with the intent of depriving the merchant of the possession, use or benefit of such cart.

Utah Code Ann. § 76-6-603 (Supp. 1988). Detention of suspected violator by merchant--Purposes.

Any merchant who has probable cause to believe that a person has committed retail theft may detain such person, on or off the premises of a retail mercantile establishment, in a reasonable manner and for a reasonable length of time for all or any of the following purposes:

(1) To make reasonable inquiry as to whether such person has in his possession ?)unpurchased merchandise and to make reasonable investigation of the ownership of such merchandise;

(2) To request identification;

(3) To verify such identification;

(4) To make a reasonable request of such person to place or keep in full view any merchandise such individual may have removed, or which the merchant has reason to believe he may have removed, from its place of display or elsewhere, whether for examination, purchase or for any other reasonable purpose;

(5) To inform a peace officer of the detention of the person and surrender that person to the custody of a peace officer;

(6) In the case of a minor, to inform a peace officer, the parents, guardian or other private person interested in the welfare of that minor immediately, if possible, of this detention and to surrender custody of such minor to such person.

A merchant may make a detention as permitted herein off the premises of a retail mercantile establishment only if such detention is pursuant to an immediate pursuit of such person.

Utah Code Ann. § 76-6-604 (Supp. 1988). Defense to action by person detained.

In any action for false arrest, false imprisonment, unlawful detention, defamation of character, assault, trespass, or invasion of civil rights brought by any person detained by the merchant, it shall be a defense to such action that the merchant detaining such person had probable cause to believe that the person had committed retail theft and that the merchant acted reasonably under all circumstances.

Utah Code Ann. § 77-7-14 (1982, amended by 1987 Utah Laws ch. 245, § 10) Person causing detention or arrest of person suspected of shoplifting -- Civil and criminal immunity.

A peace officer, merchant, or merchant's employee, servant, or agent who causes the detention of a person as provided in section 77-7-12, or who causes the arrest of a person for theft of goods held or displayed for sale shall not criminally or civilly liable where he has reasonable and probable grounds to believe the person detained or arrested committed a theft of goods held or displayed for sale.

APPENDIX "B"

Ruling, September 22, 1987

IN THE SEVENTH JUDICIAL DISTRICT COURT
in and for Duchesne County
of the State of Utah

CIVIL MINUTE ENTRY

JEFF Q. TUCKER

NO. 86-CV-94-D

VS.

DATE: SEPTEMBER 22, 1987

DEON N. DOVE, dba DOVE HAPPY
SERVICE, a corporation, BENITO
M. VAN, and John Does 1-10

JUDGE: DENNIS L. DRANEY

R U L I N G

Having fully considered the evidence and arguments of counsel, the Court finds that:

(1) Defendant Benito Van was, at all times relevant hereto, an agent of defendant Deon Dove, and acting in the scope of that agency.

(2) Defendant Van, with the assistance of others, detained plaintiff, and caused plaintiff to be searched by police officers.

(3) No property belonging to defendant's store was found on plaintiff, and none was found where it could have been placed by plaintiff, until after the citation was issued and the arrest made.

(4) Defendant Van signed the citation, and plaintiff was taken into custody by officers of the Roosevelt City Police Department and, was booked and released after posting bond in the sum of \$106.00.

(5) Criminal action was commenced against plaintiff by Roosevelt City, but was dismissed before trial upon Tucker's (plaintiff herein) Motion to Dismiss.

(6) Plaintiff employed counsel to represent him in the criminal action at the cost of \$750.00.

(7) Plaintiff suffered humiliation at being escorted from the store, through the public exit in the view of his friends and others.

FILED
DISTRICT COURT DUCHE-SNE

SEP 22 1987

JOHN K. MARETT, Clerk

0101

(8) Plaintiff's public record will show the filing of the criminal charges, which record may be expunged within the time provided by law.

(9) Based upon the foregoing Findings, the court concludes that:

(1) Having found no property of the store on plaintiff's person or where it could have been placed by plaintiff, until after the citation was signed and the arrest made. Defendants were without probable cause to take any action beyond the initial detention and search.

(2) The actions of the defendants were not done maliciously, even though no probable cause existed for the arrest.

(3) Plaintiff is entitled to general damages for money expended, and for his public humiliation.

(4) Plaintiff is not entitled to punitive damages.

Based on the foregoing Findings of Fact, and Conclusions of Law, it is hereby ordered that Plaintiff is awarded judgment as follows:

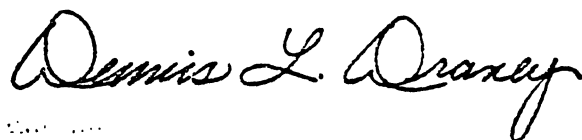
(a) \$750.00 attorneys fees for defense of the criminal action.

(b) \$106.00 for the bond posted if the same was not returned to plaintiff or his mother.

(c) \$2,500.00 for the humiliation caused by his arrest.

Plaintiff's counsel is requested to prepare formal Findings of Fact, Conclusions of Law, and Judgment in accordance with this ruling, and the provisions of Rule 2.9, Rules of Practice.

DATED: September 22, 1987



District Court Judge

copy to:

George E. Mangan
Fred D. Howard

APPENDIX "C"

Findings of Fact and Conclusions of Law

36 1. On November 19, 1986, at approximately 6:00 PM, the
37 plaintiff in the company of three of his friends, was a business
38 invitee at a grocery store in Roosevelt, Utah, that belongs to
39 the defendant Deon Dove.

40 2. At all times relevant hereto, the defendant Benito Van
41 was an authorized agent of the defendant Deon Dove, and was
42 acting within the scope and authority of that agency. In
43 particular, defendant Van was in charge of security at the
44 Roosevelt store of defendant Dove.

45 3. When plaintiff had completed the purpose that he had
46 came to the store of defendant Deon Dove for, he was about to
47 exit the same, when he was requested by the defendant Van to
48 accompany Van and a third party to a room at the rear of the
49 store so that they could talk to the plaintiff.

50 4. Plaintiff voluntarily complied with the request made by
51 defendant Van, by accompanying Van to the room to the rear of the
52 store.

53 5. In the back room plaintiff inquired as to why the
54 defendant Van wanted to talk to him. Van indicated that they
55 were waiting for the Roosevelt City Police to come.

56 6. When the Roosevelt City Police officers arrived at the
57 store, the defendant Van directed the Police officers to search
58 plaintiff and another individual. The defendant Van specifically
59 indicated that he thought that plaintiff had removed a TV
60 "splitter" from its carton, and he was sure that one of the two
61 boys had it on them.

62 7. The search of the plaintiff by the Roosevelt City
63 Police officers failed to produce any property on the person of
64 either the plaintiff or the other individual, that belonged to
65 the store of the defendant Deon Dove.

66 8. When the Police Officers inquired as to what the
67 defendant Van intended to do, the defendant Van then placed the
68 plaintiff under arrest, and requested the Roosevelt Police
69 Officers to transport plaintiff to the Roosevelt Police Station
70 for booking, etc. The defendant Van signed the citation charging
71 the plaintiff with shoplifting.

72 9. After the plaintiff had been placed under arrest and
73 transported by the Roosevelt City Police officers to the Police
74 Station, an agent of the defendant Dove found on one of the
75 shelves in the store, the item that the defendant Van alleged
76 that the plaintiff had stolen.

77 10. The plaintiff was handcuffed and escorted from the
78 store of the defendant Dove through a public exit, and in the
79 view of his friends and other shoppers.

80 11. The Roosevelt City Police officers transported the
81 plaintiff to the Police Station, where the plaintiff was booked,
82 i.e., finger-printed, mug shot taken, and a permanent criminal
83 record was made. Plaintiff was subsequently released after
84 posting a bond in the sum of \$106.00.

85 12. A formal criminal action was commenced against the
86 plaintiff in the Seventh Circuit Court of the State of Utah,
87 Roosevelt Department. Said criminal action was dismissed before

88 the trial. Counsel for Roosevelt City and Mr. Tucker, stipulated
89 as to the facts and each submitted a memorandum of Law. The
90 Court held that as a matter of law, the plaintiff had not
91 committed a crime.

92 12. Plaintiff hired counsel to represent him in the
93 criminal charges, and the fees for said representation was
94 \$750.00.

95 13. Plaintiff suffered humiliation at being arrested, hand-
96 cuffed and escorted from the store of the Defendant Dove by
97 Roosevelt City Police Officers.

98 14. Plaintiff's public record will show the filing of the
99 criminal charges against him. The Court takes judicial notice
100 that said record may be expunged within the time provided by law.

101 Based upon the foregoing Findings of Fact, the Court now
102 makes and enters the following

103 CONCLUSIONS OF LAW

104 1. Inasmuch as the defendant Van was an agent of the
105 defendant Dove, and was acting within the scope and authority of
106 the agency that existed between the defendant Van and the
107 defendant Dove, then as a matter of law, the defendant Dove is
108 responsible for the actions complained of herein.

109 2. The plaintiff was a business invitee of the defendant
110 Dove at the times complained of by the plaintiff.

111 3. The acts complained of occurred in Roosevelt, Duchesne
112 County, Utah, and this court has jurisdiction over the persons

113 and subject matter of this dispute. Venue properly lies in this
114 Court.

115 4. The defendant Van may have had cause to stop the
116 plaintiff and request that the plaintiff submit to a search to
117 determine if the plaintiff had taken or secreted any property
118 belonging to the defendant Dove.

119 5. When the defendant Van found no property of the
120 defendant Dove on the plaintiff's person or where it could have
121 been placed by plaintiff, and having not located the item until
122 after the citation had been signed and the arrest had been made,
123 defendants were without probable cause to take any action beyond
124 the initial detention and search and detention and search.

125 6. The actions of the defendants were not done
126 maliciously, even though no probable cause existed for arresting
127 plaintiff.

128 7. The plaintiff is entitled to general damages for the
129 money he expended for posting bond and attorney fees.

130 8. The plaintiff is entitled to compensatory damages for
131 his public humiliation. The Court concludes that the sum of
132 \$2,500.00 is sufficient to compensate the plaintiff for the same.

133 9. Having found no malicious conduct on the part of the
134 defendants, the Court concludes that the plaintiff is not
135 entitled to punitive damages.

136 10. Plaintiff ought to be awarded his costs, expenses and
137 interest as allowed by law.

138 Dated this 1st day of February 1987.

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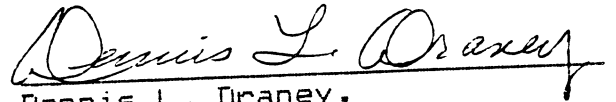
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BY ORDER OF THE COURT

A handwritten signature in cursive script, reading "Dennis L. Draney", written over a horizontal line.

Dennis L. Draney,
District Judge

APPENDIX "D"

Judgment

GEORGE E. MANGAN (2068), of
GEORGE E. MANGAN, APC
Attorney for Plaintiff
47 North Second East
Roosevelt, Utah 84066
801-722-2428

FILED
JAN 13 1988
FEB 1 1988
ROGER N. WATSON

IN THE SEVENTH JUDICIAL DISTRICT COURT OF DUCHESNE COUNTY,
STATE OF UTAH

JEFF Q. TUCKER,)

Plaintiff,)

vs.)

DEON N. DOVE, dba DOVE'S
HAPPY SERVICE, a corporation)
BENITO M. VAN and JOHN DOES)
1-10,)
Defendants.)

JUDGMENT

Civil No. 86-CV-94 D
Judge Dennis L. Draney

Computer

The above entitled matter came on regularly for trial on September 15, 1987, before the Honorable Dennis L. Draney. The plaintiff was present with his attorney, George E. Mangan. The defendants were also present with their attorney Fred D. Howard. Witnesses were called, sworn and did testify. Numerous exhibits were marked, identified and received into evidence. Both parties rested, and each argued their case to the Court and responded to inquiries of the Court. The Court took the matter under advisement.

The Court having separately made and entered its Findings of Fact and Conclusions of Law, does ORDER, ADJUDGE AND DECREE as follows:

1. The plaintiff shall have and recover judgment against the defendants, jointly and separately.

2. The plaintiff is awarded judgment for the \$750.00 he incurred in attorney fees to defend in the criminal action.

3. The plaintiff is awarded judgment for the \$106.00 bond posted by the plaintiff if the same was not returned to the plaintiff or his mother.

4. The plaintiff is awarded judgment in the sum of \$2,500.00 for the humiliation he suffered by reason of his false arrest by the defendants.

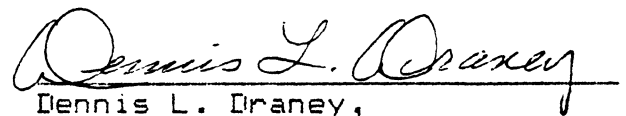
5. Plaintiff shall forthwith file a Memorandum of Costs and expenses as required in the Utah Rules of Civil Procedure.

6. Plaintiff is entitled to pre-judgment interest on all moneys found to be due and owing to the plaintiff, as provided in _____ - UCA, as amended.

7. The sums awarded to plaintiff shall accrue interest at the highest legal rate allowed for judgments, which currently is 12% per annum.

Dated this 14 day of ~~November~~ ^{February}, 198~~7~~⁸.

BY ORDER OF THE COURT


Dennis L. Draney,
District Judge