

1988

# Jeff Q. Tucker v. Deon N. Dove, dba Dove's Happy Service, a corporation, Benito M. Van, and John Does 1-10 : Brief of Respondent

Utah Court of Appeals

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**UTAH COURT OF APPEALS  
BRIEF**

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*440350-CA*

**IN THE UTAH COURT OF APPEALS**

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JEFF Q. TUCKER,

Plaintiff - Respondent,

vs.

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

Defendants - Appellants

Case No. 880350-CA

Category 14b

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**RESPONDENT'S BRIEF**

---oo0oo---

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

**FILED**

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IN THE UTAH COURT OF APPEALS

--ooOoo--

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	:	

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ATTORNEYS FOR APPELLANTS

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# IN THE UTAH COURT OF APPEALS

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JEFF Q. TUCKER,	:	
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vs.	:	
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SERVICE, a corporation, BENITO M.	:	
VAN, and JOHN DOES 1 through 10,	:	Category 14b
Defendants - Appellants	:	

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## RESPONDENT'S BRIEF

--oo0oo--

### JURISDICTION AND NATURE OF PROCEEDINGS BELOW

Pursuant to §78-2-2(i), Utah Code Annotated (1987), the Supreme Court had jurisdiction to hear this appeal. Pursuant to the provisions of §78-2-2(4), UCA, this matter was transferred to the Court of Appeals. The jurisdiction of this Court is specified in §78-2a-3(2)(h), UCA.

The matter was tried to the Court, without a jury. From a judgment in favor of respondent, appellants have appealed. The respondent has filed a cross-appeal, challenging the inadequacy of the award.

## **ISSUES PRESENTED**

Appellants have stated the issues they wish the Court to consider on appeal. Respondent presents the following issues:

1. Were the damages awarded by the Court sufficient?
2. Was respondent entitled to punitive damages as a matter of law?
3. Did the Court err in holding that respondent's record could be expunged?
4. Is respondent entitled to his attorney fees on appeal?

## **RELEVANT STATUTES**

Appellants have suggested those statutes they felt were relevant. Respondent would suggest that §78-27-44 UCA, dealing with pre-judgment interest on damages arising from torts, is also applicable.

## **STATEMENT OF THE CASE**

### **A. NATURE OF THE CASE:**

Respondent's cause of action arose out of his false arrest by appellants. Respondent was detained for a search by defendants. Respondent voluntarily consented to appellants' search. The search revealed that there was nothing belonging to appellants on respondent. Notwithstanding, appellants caused respondent to be arrested.

**B. COURSE OF PROCEEDINGS AND DISPOSITION BELOW:**

Appellants' summary is a fair recitation of the proceedings and disposition below.

**C. STATEMENT OF FACTS:**

Appellants' "Statement of Facts" contain many undisputed facts. However, appellants' statement of the "facts" are so inter-twined with appellants' argument, that is difficult to ascertain where facts end and argument begins. As a result respondent suggests the following is a clearer recitation.<sup>1</sup>

1. The defendant Deon Dove, is the sole owner and proprietor of a retail grocery store in Roosevelt, Utah, known as Dove's Happy Service. [T pg 201]

2. On November 19, 1985, respondent was 18 years of age, a senior at Union High School in Roosevelt, and had no criminal record. [T pg 56]

3. On November 19, 1985, respondent, in the company of three friends, namely James Wymer, Mike Harmston and Toby Clark, (hereafter Wymer, Harmston and Clark, respectably), entered Dove's as business invitees. [T pg 58+]

4. At the time in question, appellant Benito M. Van (hereafter Van), was employed by Deon Dove as a security guard, assigned to watch for shoplifters. [T pg 193]

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<sup>1</sup> Reference in the brackets is to the Transcript of the Trial, and identified by the letter "T".



5. Van claimed that when respondent and friends entered Dove's, he was on a "catwalk" where he could look down and observe the entire store. Van claimed that from the catwalk he watched the respondent and his friends enter the store. [T pg 212+]

6. Wymer, who was with the respondent, knew Van from a church basketball program. [T pg 122] Wymer testified that he and the others "ran into" Van upon entering the store with respondent. Wymer testified that he stopped to talk to Van about the church athletic program, while the respondent, Clark and Harmston "went up the aisle." The conversation between Van and Wymer lasted at least 10 minutes. [T pgs 124; 62, 63; 221]<sup>2</sup>

7. Respondent, Clark and Harmston left Wymer with Van and went to look for wire for Harmston's stereo. [T pg 62]

8. In the section of the Dove's where respondent and his friends were looking for stereo wire, respondent observed a package containing a TV splitter. This package had been previously opened. [T pg 63+]<sup>3</sup>

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<sup>2</sup> Wymer testified that he talked with Van at least 10 minutes. Van testified on page 221, that he talked to Wymer for "about fifteen, twenty minutes." Wymer, Clark, Harmston and respondent testified that said conversation took place as they came into the store. Van testified that it occurred after he had watched the boys from the cat walk. Based on all of the testimony, respondent and his friends were in the store from 15 to 20 minutes.

<sup>3</sup> Van testified that he observed respondent open the package. Harmston, Clark and respondent each testified that the package was open when respondent first touched it.

9. Respondent did remove the splitter from the previously opened container, to examine it. [T pg 63] Respondent was observed by Harmston and Clark, looking at the splitter. [T pgs 155; 181, 182]

10. Harmston personally observed respondent place the splitter at the end of the aisle, by the potato chips. [T pgs 182, 183] There was no attempt by respondent to conceal the splitter. [T pgs 66; 77; 79]

11. Respondent immediately joined his friends in the front of the store, at the magazine rack. [T pgs 67; 126; 184] Wymer testified that as he left Van he went to the magazine rack, and had just started looking at a magazine when respondent arrived. Respondent and his friends did look through some magazines. [T 67]

12. Respondent and his friends exited the store in two or three groups. [T pgs 68; 126+]

13. Van and another employee of Dove's stopped respondent and requested that respondent come back into the store with them. [T pg 68] Van then stopped Clark and requested Clark to come back into the store with him. [T pg 156] Clark and respondent voluntarily complied with the requests. [T pgs 69; 157]

14. In the store, respondent and Clark asked Van what was wanted. Van told them he "had suspicions that they had been shoplifting." [T pgs 70; 157]

15. Respondent informed Van that he (respondent) had not stolen anything. Clark and respondent each offered to be

searched. Van refused to search either of them until an officer from the Roosevelt Police Department arrived. [T pg 70]

16. When Officer Patton from the Roosevelt Police Department arrived, Patton asked "which one was it?" Van indicated "I'm not sure. We will have to search them both to see which one took the item." [T pg 71]

17. At Van's request, both Clark and respondent were thoroughly searched by Patton. Officer Patton could not find anything on either Clark or respondent. [T pgs 71; 158]

18. When Officer Patton was unable to find any stolen item on either Clark or respondent, Patton asked Van what he wanted to do. Van responded that he wanted respondent arrested. [T pg 71; 233] Respondent was then handcuffed and taken from Dove's by the Police. Many of his friends and associates witnessed the event.

19. While respondent was being transported to the Police Department, Van went through the store, and found the splitter on a store shelf. [T pg 223] Van claimed it was "behind" some potato chips. [T pg 223] Respondent and Steve Harmston stated that it was left in plain sight. [T pgs 65; 182, 183]<sup>4</sup>

20. After Van had located the splitter, he went to the Roosevelt Police station. It was then that Van formally signed a criminal complaint against respondent. [T pgs 72-75]

21. Respondent was finger printed, had a "mug-shot" taken, was booked and incarcerated. [T pg 75] Respondent was

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<sup>4</sup> Van acknowledged that there were other customers in the store, and that another customer may have moved the splitter from where respondent had set it down.

informed by Officer Patton that the mug-shot and finger prints would be sent to be the FBI and retained "for ever." [T pg. 76]

22. Bond was set in the sum of \$106.00. Later that evening, respondent was bonded out by his mother. [T pg 75]

23. Respondent moved the Circuit Court to dismiss the criminal charges against him on the basis that he had not committed a crime. The matter was submitted to the Court upon stipulated facts. The Circuit Court held as a matter of law, that respondent had not committed a crime.

24. Respondent expended \$750.00 in attorney fees to defend himself in the criminal proceedings. [T pgs 79-80]

## **SUMMARY OF ARGUMENT**

A summary of respondents' response and argument, is as follows:

1. Probable cause to detain to search and probable cause to effect an arrest, are two separate and distinct matters. 2. Appellants are attempting to confuse the issue by claiming that the basis for stop to search is justification for making an arrest. It is appellants' arguments, and not the Court's ruling that are inconsistent.

3. The damages awarded by the Court are insufficient, considering the totality of the circumstances.

4. Under the prevailing case law, respondent is entitled to punitive damages as a matter of law.

5. Respondent was not convicted of any crime, and therefore there is nothing to be expunged. The respondent now has an arrest record, which cannot be expunged. Thus, the Court erred in holding that respondent's record could be expunged.

6. Appellants' appeal is without merit. Respondent is entitled to his attorney fees on appeal as a matter of law.

7. Respondent is entitled to pre-judgment interest as provided in §78-27-44 UCA.

## **ARGUMENT**

### **POINT ONE**

#### **THERE IS A DIFFERENCE BETWEEN PROBABLE CAUSE TO SEARCH AND PROBABLE CAUSE TO ARREST**

Appellants correctly point out that "the determination of reasonableness and probable cause, which are requisites 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, 320-321 (1979).<sup>5</sup>

Even with that admission, appellants refuse to accept the plain and clear resolution of that issue by the trier of fact. Appellants spend a great deal of their brief suggesting that if one has probable cause to stop another for the purpose of searching and ascertaining whether a crime has been committed, that the same constitutes probable cause to also arrest.

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<sup>5</sup> See Appellants' Brief, page 7.

The fallaciousness of appellants' argument is readily apparent. While the one act, stopping and detaining to search, may have been reasonable, to equate that right with the right to arrest is preposterous. Appellant cites §76-6-603, UCA, to support the right to detain and arrest, if the merchant has "probable" cause. In the proceedings below, respondent did not attempt to question the right of the appellant to stop, question and possibly search the respondent. However, once the appellant had accomplished that purpose, and once appellant had ascertained that respondent had nothing "concealed" on him, there was no probable cause or even a reasonable excuse for arresting respondent. There is a significant difference between the right to stop for the purpose of questioning and searching and actually arresting a person. The statute extends protection to those individuals who have "reasonable and probable grounds to believe the person detained or arrested committed a theft of goods held or displayed for sale." §77-7-14, UCA. (1987) [emphasis added].<sup>4</sup>

Appellants seem to find solace in the provisions of §76-6-604, UCA. Appellants would have the Court read "false arrest", "false imprisonment" and "unlawful detention", as being in the conjunctive, i.e., if one is authorized, then the others are justified. The fallacy of that argument is ascertained by reading the rest of the descriptions in the statute, i.e.,

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<sup>4</sup> The applicable statute was amended in 1987 to provide "reasonable and probable cause" rather than grounds. There were other slight changes in the wording of the statute. None are particularly important to the outcome of this dispute.

"defamation of character, assault, trespass, or invasion of civil rights". The only logical interpretation that can be drawn from appellants' argument is that the statute makes each of the enumerated acts conjunctive. If that were the case, then the logical extension of that argument is, if the merchant is justified in detaining an individual, and afterwards the merchant should, without provocation, assault that individual, then because the merchant was originally justified in stopping and searching the individual, the merchant is also justified in the assault. Such an argument is ludicrous.

A reasonable and logical reading of §76-6-604 UCA indicates that each of the merchant's acts are to be considered in the disjunctive. In each instance, in order to avoid civil liability, the merchant must have **probable cause** and he must have **"acted reasonably under all circumstances."** [Emphasis added] It is readily apparent to the most casual, impartial observer, that appellants' argument is without merit. Respondent urges the Court to hold that probable cause to detain for a search and probable cause to effect an arrest, are two separate and distinct acts. The right to do one is not in and of itself the right to do the other. No other reading of the statute makes sense.

Appellants also cite several opinions of the Utah Supreme Court, in **criminal matters**, to bolster their argument that even though respondent did not have any merchandise on him when searched, that appellants acted in good faith in arresting

respondent.<sup>7</sup> Even the most cursory reading of the cited cases suggest that appellants are not urging a fair or applicable interpretation. The most obvious differences between this matter and the cases cited, are as follows: 1. The cases cited were criminal; 2. The appellants had all been convicted by the Trier of Fact of having committed a crime; 3. The standard of review on appeal in a criminal case is whether the Court's decision is "against the clear weight of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made."<sup>8</sup>

It apparently escaped appellants' recognition, but in this matter two different trier of the fact have determined, in essence, that there was no probable cause for appellants to have arrested respondent. It is undisputed that the Circuit Court granted respondent's motion to dismiss because under no possible stated facts was there any evidence a crime had been committed by anyone, much less respondent. The trial judge held that while the initial detention was justified, there was no justification or probable cause for the arrest.

Appellants must realize that this is a civil case, and that there is ample evidence to support the findings of the trier of fact. Appellants must also realize that since there was

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<sup>7</sup> State v. Watts, 639 P.2d 158, 162 (Utah 1981); State v. Eagle, 611 P.2d 1211 (Utah 1980) State v. Bender, 581 P.2d 1019.

<sup>8</sup> State v. Walker, 743 P.2d 191, 193 (Utah 1987); URCP 52(a); and cited in State v. Goodman, 91 Utah Adv. Rep. 3, pg 3 (Utah 1988).



sufficient evidence before the trier of the fact to support the decision of the lower Court, that this Court will not reverse on appeal.

## **POINT TWO**

### **COURT'S RULING WAS CONSISTENT**

As indicated above, appellants are attempting to confuse the issue by claiming that the justification for detaining is justification for arrest.<sup>9</sup> Appellants' Brief urges the proposition that the Trial Court's Ruling is internally inconsistent.<sup>10</sup> In view of the arguments raised in Point One above, respondent would urge the Court to find that it is appellants' reasoning, and not the Court's ruling that is inconsistent. Justification to engage in a search is not justification to go beyond what a legal search would authorize. The Trial Court has found that the evidence preponderates against appellants. This Court should also find against appellants.

## **POINT THREE**

### **INSUFFICIENCY OF AWARDED DAMAGES**

It is the duty of the trier of fact to assess damages. Damages should reflect the totality of all the facts and circumstances. Damages should not unfairly compensate the victim, but should be sufficiently adequate to compensate the

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<sup>9</sup> See Appellants' Brief, page 10.

<sup>10</sup> See Appellants' Brief, page 7.

victim for the wrongs of the tortfeasor. Respondent recognizes that broad discretion is given the trier of fact to determine what those damages should be.

The lower court found for respondent, but only awarded respondent \$2,500.00 in general damages and \$854.00 in specials. Respondent cross-appealed, claiming the same to be insufficient. The reasons respondent believes the damages awarded by the trial court are insufficient, are as follows:

1. Respondent was only 18 years old at time complained of, and a senior in high school.

2. Respondent stole nothing from appellants.

3. Appellants with full knowledge that respondent had not stolen anything from them, still had him arrested.

4. Respondent did not have a criminal or police record at the time appellants had respondent arrested.

5. Appellants knew that by arresting respondent, he (respondent) would be booked, finger-printed, mug-shot and a permanent record of the arrest would be entered in the files and records of all law enforcement agencies.

6. Respondent was humiliated in front of his friends and associates, by being falsely arrested for a crime that neither he nor anyone else committed.

Considering the totality of the facts and circumstances, the damages awarded by the Court are plainly insufficient. The Respondent respectfully requests the Court of Appeals to remand

victim for the wrongs of the tortfeasor. Respondent recognizes that broad discretion is given the trier of fact to determine what those damages should be.

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5. Appellants knew that by arresting respondent, he (respondent) would be booked, finger-printed, mug-shot and a permanent record of the arrest would be entered in the files and records of all law enforcement agencies.

6. Respondent was humiliated in front of his friends and associates, by being falsely arrested for a crime that neither he nor anyone else committed.

Considering the totality of the facts and circumstances, the damages awarded by the Court are plainly insufficient. The Respondent respectfully requests the Court of Appeals to remand

the matter to the Trial Court with instructions to review the damages, and award additional damages to the respondent.

#### **POINT IV**

#### **RESPONDENT IS ENTITLED TO PUNITIVE DAMAGES**

In the case of McFarland v. Skaqgs Companies, Inc., 678 P.2d 298 (Utah 1984), Utah departed from the standards adopted in Terry v. Zions Co-op. Mercantile Institution, 605 P.2d 314 (1979), for the award of punitive damages in a false arrest case. In McFarland, the Court reviewed several other jurisdictions and "persuasive scholarly reasoning" to determine there was "a sufficient and sound basis . . . for departing from the malice in law standard followed in Terry. Accordingly, we adopt as the appropriate standard for determining the availability of a punitive damage award in an action for false imprisonment that of 'malice in fact' or 'actual malice'." [at pg. 304]

Respondent recognizes that the present standard for awarding punitive damages is that of "malice in fact" or "actual malice" in a false arrest claim. When one considers the totality of the facts, especially appellants' knowledge that respondent had not stolen anything, together with appellants' understanding that once respondent was arrested he would have a permanent arrest record, then the Court ought to conclude, that by the overwhelming weight of the evidence, the actions of appellants constitute actual malice or malice in fact.

Respondent requests the Court to remand the matter to the trial court for the purpose of determining the amount that ought to be awarded as punitive damages.

## **POINT V**

### **EXPUNGEMENT OF ARREST RECORD**

The Court held that the arrest record of the respondent could be expunged, and therefore he would not be damaged by the same. The statutes dealing with expungement deals with convictions.<sup>11</sup>

The respondent was never convicted of a crime. There is no criminal conviction to be expunged. There is only the matter of the arrest. Officer Patton testified that the arrest record had been sent to the FBI. Regardless of the disposition of the criminal charges, respondent now has a permanent record that he was arrested in Roosevelt, Utah on November 19, 1985 for shoplifting. No matter what respondent does in life, that record is available to anyone who runs a confidential, security clearance on the respondent.

Most of us realize that perception is oft times worse than reality. The fact that there is an arrest record will be perceived by far too many people as a "guilt by association." Respondent was not convicted of any crime, and therefore there is nothing to be expunged. Appellant has caused respondent to have an arrest record, which cannot be expunged.

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<sup>11</sup> See §77-18-2, UCA

The lower court erred when it ruled that the respondent would be able to expunge the record, and that respondent was not harmed by the same.

## **POINT VI**

### **PREJUDGMENT INTEREST**

The right to prejudgment interest on the damages arising from injuries arising out of a tort, is codified in §78-27-44, UCA. While appellants may argue that respondent is not entitled to prejudgment interest, the fact is that the legislature has made it clear that the same is a right of respondent. The Trial Court did not err by awarding the same.

## **POINT VII**

### **ATTORNEYS FEES ON APPEAL**

Respondent would respectfully suggest that appellants' appeal has been frivolous and without merit. The time spent in preparing respondent's reply, and subsequent appearance before the Court, should be compensated by the appellants. The legislature has made it the public policy of this state to impose attorney fees where the action is without merit or brought in bad faith. See §78-27-56, UCA.

Respondent respectfully requests that he be awarded his attorneys fees and other expenses on appeal.

## **CONCLUSION**

Probable cause to detain to search and probable cause to effect an arrest, are two separate and distinct matters. Appellants are attempting to confuse the issue by claiming that the right to stop to search is justification for making an arrest. It is appellants' arguments, and not the Court's ruling that are inconsistent.

The damages awarded by the Court are insufficient, considering the totality of the circumstances. Further, under the circumstances, appellants' actions towards respondent ought to be held to have been actual malice or malice in fact. Under the prevailing case law, respondent is entitled to punitive damages as a matter of law.

Respondent was not convicted of any crime, and therefore there is nothing to be expunged. Appellants have caused respondent to have an arrest record, which cannot be expunged. The lower court erred in holding that respondent's record could be expunged.

Appellants' appeal is without merit. Respondent is entitled to his attorney fees on appeal as a matter of law. Respondent is entitled to pre-judgment interest as provided in §78-27-44 UCA.

Dated this 10th day of November, 1988.

---

George E. Mangan

CERTIFICATE OF MAILING

I certify that on November \_\_\_\_, 1988, I mailed two copies of Respondent's Brief to Fred D. Howard and Leslie W. Slaugh, Attorneys for Appellants, 120 East 300 North, Provo, UT 84601, postage prepaid.

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Attorney