

1986

Utah v. Miller : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

David L. Wilkinson; attorney general; attorney for respondent.

Edward K. Brass; attorney for appellant.

Recommended Citation

Brief of Appellant, *Utah v. Leonard G. Miller*, No. 860347.00 (Utah Supreme Court, 1986).
https://digitalcommons.law.byu.edu/byu_sc1/1236

This Brief of Appellant 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 by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH

:

Plaintiff/Respondent

:

-v-

:

LEONARD G. MILLER

:

Case No. 860335-
860347-CA

Defendant/Appellant

:

Category No. 2

BRIEF OF APPELLANT

Appeal from judgment and convictions of retail theft while armed with a deadly weapon, a second degree felony, aggravated assault, a third degree felony, and possession of a dangerous weapon by a restricted person, a third degree felony, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Judith M. Billings, Judge, presiding.

UTAH COURT OF APPEALS

BRIEF

UTAH

DOCUMENT

K F U

.A10

DOCKET NO. 860347-CA

DOCKET NO. _____

DAVID L. WILKINSON

Attorney General

Attorney for Plaintiff/Respondent

236 State Capitol Building

Salt Lake City, Utah 84114

EDWARD K. BRASS

Attorney for Appellant

321 South 600 East

Salt Lake City, Utah 84111

FILED

FEB 13 1987

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH :
Plaintiff/Respondent :
-v- :
LEONARD G. MILLER : Case No. 860335
Defendant/Appellant : Category No. 2

BRIEF OF APPELLANT

Appeal from judgment and convictions of retail theft while armed with a deadly weapon, a second degree felony, aggravated assault, a third degree felony, and possession of a dangerous weapon by a restricted person, a third degree felony, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Judith M. Billings, Judge, presiding.

EDWARD K. BRASS
Attorney for Appellant
321 South 600 East
Salt Lake City, Utah 84111

DAVID L. WILKINSON
Attorney General
Attorney for Plaintiff/Respondent
236 State Capitol Building
Salt Lake City, Utah 84114

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES.	ii
STATEMENT OF ISSUES	iii
STATEMENT OF THE CASE	1
STATEMENT OF FACTS.	1
SUMMARY OF ARGUMENT	6
ARGUMENT.	8
POINT I: <u>DELAY OF FIVE MONTHS BETWEEN ARREST AND TRIAL, CAUSED BY THE PROSECUTION, VIOLATED MR. MILLER'S CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL</u>	8
POINT II: <u>THE TRIAL COURT VIOLATED APPELLANT MILLERS CONSTITUTIONAL RIGHT AGAINST DOUBLE JEOPARDY IN REVERSING ITS ORDER TO DISMISS THE AGGRAVATED ASSAULT CHARGE.</u>	16
CONCLUSION.	18

TABLE OF AUTHORITIES

CASES CITED

	PAGE
<u>Barker v. Wingo</u> , 407 U.S. 514 (1972).	6, 9, 11, 13
<u>Benton v. Maryland</u> , 395 U.S. 784 (1969)	16
<u>Klopper v. North Carolina</u> , 386 U.S. 213 (1967).	8
<u>People v. Wilson</u> , 383 P.2d 452 (Calif. 1963).	8
<u>State v. Banner</u> , 717 P.2d 1325 (Utah 1986)	8
<u>State v. Hafen</u> , 593 P.2d 538 (Utah 1979).	7, 9
<u>State v. Hunter</u> , 437 P.2d 208 (Utah 1968)	16
<u>State v. Knill</u> , 656 P.2d 1026 (Utah 1969)	10
<u>State v. Lozano</u> , 462 P.2d 710 (Utah 1969)	10
<u>State v. Rasmussen</u> , 418 P.2d 134 (Utah 1966)	10
<u>State v. Viles</u> , 702 P.2d 1175 (Utah 1985)	10
<u>United States v. Ewell</u> , 383 U.S. 116 (1966)	14

STATUTES CITED

Utah Code Ann. Section 76-1-402 (1953, As Amended).	16
Utah Code Ann. Section 77-1-6 (1953, As Amended).	8
Utah Code Ann. Section 77-29-1 (1953, As Amended)	10

OTHER AUTHORITIES

United States Constitution, Fifth Amendment	16
Utah Constitution, Article 1, Section 12.	16
<u>Utah Board of Pardons Policy and Procedure Manual</u> , Policy No. A09/12, June 2, 1986.	15

STATEMENT OF ISSUES

1. Did a delay of five months between arrest and trial, caused by the prosecution, violate appellant Miller's right to a speedy trial?
2. Did the Trial Court violate Appellant Miller's right against double jeopardy by reversing its order to dismiss the aggravated assault charge?

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Respondent	:	
-v-	:	
LEONARD G. MILLER	:	Case No. 860335
Defendant/Appellant	:	Category No. 2

BRIEF OF APPELLANT

STATEMENT OF THE CASE

The Appellant, Leonard G. Miller, appeals from judgment and convictions of retail theft while armed with a deadly weapon, a second degree felony, aggravated assault, a third degree felony and possession of a dangerous weapon by a restricted person, a third degree felony, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Judith M. Billings, Judge, presiding.

STATEMENT OF FACTS

On November 9, 1985, the appellant, Mr. Leonard Miller, was involved in a fight with one Ralph Robinson. Mr. Miller was issued a citation for simple assault and ordered to appear in Fifth Circuit Court, West Valley Division, to answer charges on November 18, 1985. Mr. Miller failed to appear. A bench warrant was issued for his arrest.

On December 4, 1985, Leonard Miller allegedly walked into a Food-4-Less grocery store in West Valley City, picked up a case of beer and a carton of cigarettes, and walked out the door without

paying for them. (R. 81). The assistant manager, David K. Bennion, observed Mr. Miller, followed him out the door into the parking lot and confronted him. (R.82) Upon not receiving a satisfactory answer to his request to see a receipt, Mr. Bennion asked Mr. Miller to accompany him back into the store. (R. 83). Mr. Miller refused. (R. 84) At this point, Mr. Bennion grabbed Mr. Miller by the arm and began pulling him toward the door. (R. 84). Mr. Miller then put the beer and cigarettes on the ground and pulled a hunting knife from a scabbard he was wearing on the outside of his belt. (R. 84-85). Mr. Miller told Mr. Bennion that he would not go into the store, but that he would return the beer and cigarettes. (R. 85). The knife was out about 20 seconds. (R. 93). Mr. Miller did not make pay thrusting movements (R. 92) nor any verbal threats. (R. 92). He merely refused to go with Mr. Bennion and returned the knife to its scabbard when Mr. Bennion let go of him. (R. 92). Mr. Bennion then picked up the beer and cigarettes and returned them to the store. (R. 93). Mr. Miller thanked Mr. Bennion for letting him go, and left the premises (R. 93). Upon his return to the store, Mr. Bennion called the police. (R. 87). Witnesses to the incident noted Mr. Miller's automobile license number, turned it over to Mr. Bennion who turned it over to the police. (R. 86-87). The police arrested Mr. Miller at his home, that evening, (R. 107) took him back to the store where Mr. Bennion identified him. (R. 108). Mr. Miller was then booked into county jail.

On December 6, Mr. Miller was charged, by the state with

one count of aggravated assault, a third degree felony, and one count of retail theft while armed with a deadly weapon, a hunting knife, a second degree felony. The case number assigned was 85-1692. (See Addendum A).

On December 6, 1985, Mr. Miller was taken from the County Jail in the Circuit Court in West Valley and arraigned on the simple assault charge arising out of the fight with Ralph Robinson on November 9. Pre-Trial Conference was set for January 7, 1986. (R. 10).

On December 17, 1985, a preliminary hearing was held before Judge Gibson in Fifth Circuit Court on the two felony charges arising out of the shoplifting incident that occurred on December 4, 1985. Mr. Miller was bound over on those two charges for trial in Third District Court. (R. 2).

On December 20, 1985, an information was filed against Mr. Miller by West Valley City, charging one count of simple assault, a misdemeanor. The name of the victim was David K. Bennion, the victim in the shoplifting incident that occurred on December 4, 1985. The police report referred to was 85-29842, the report filed in the shoplifting incident. However, the date of the incident was listed as November 9, 1985, the date of the fight with Mr. Robinson. Also, the place the incident occurred was listed as 1476 West Parkway, the place the fight occurred with Mr. Robinson. Pre-Trial was set for January 7, 1986. (See Addendum B).

On January 3, 1986, Mr. Miller was arraigned before Judge Judith Billings in Third District Court on the two felony charges arising out of the shoplifting incident. Mr. Miller pled not guilty. Trial was set for February 13, 1986.

On January 7, 1986, Mr. Miller was taken from the County Jail to a pre-trial conference before Judge Burton in West Valley City. (R. 10). The information upon which the proceedings were held was the information charging simple assault against David K. Bennion, police report 85-29842; in short, the shoplifting case. (See Addendum B). Upon the advice of counsel, Mr. Miller pled guilty in a plea bargain arrangement to the lesser included offense of disorderly conduct. (R. 11). Mr. Miller was sentenced to twenty days and credited for time served. (R. 11). Believing that the shoplifting incident against David Bennion was resolved, Mr. Miller moved to dismiss the two felony charges, arising out of the same incident, pending in Third District Court.

On January 9, 1986, the Salt Lake County Prosecutor's Office filed a second information against Mr. Miller arising out of the shoplifting incident. This information was filed for the purpose of adding the charges of aggravated robbery in the alternative to retail theft, and possession of a weapon by a restricted person. Case number assigned was CR86-500. (See Addendum C) (R. 18).

On January 31, 1986, a hearing on the defense motion to dismiss the original charges brought against Mr. Miller as a result of the shoplifting incident, case number 85-1692, was held before Judge Billings. Believing, as did Mr. Miller and, at the time, the prosecutor, that the West Valley simple assault charge against David Bennion, filed December 20, 1986, arose out of the same criminal episode, she held that the aggravated assault felony was resolved by Mr. Miller's plea of guilty to disorderly conduct. (See

Addendum D). The State was thus barred from prosecuting Mr. Miller on aggravated assault. The retail theft charge was, however, left intact. (See Addendum D).

On February 13, 1986, a preliminary hearing was held before Judge Noel in Fifth Circuit Court on the second information. Judge Noel delayed bind over pending the resolution of a state motion to reconsider the Order of Dismissal of the Aggravated Assault Charge. (R. 131).

On February 21, 1986, the prosecution filed a motion to reconsider the Order of Dismissal. (See Addendum E). A hearing was held on April 2, 1986. (R. 128). The prosecution asserted that the information filed in West Valley on December 20, charging simple assault against David Bennion, on the basis of a police report on the shoplifting incident, was in actuality, the simple assault against Ralph Robinson which occurred November 9. (R. 135). Thus, asserted the prosecution, Mr. Miller did not plead guilty to disorderly conduct as to the shoplifting incident, but pled guilty to the assault arising out of the fighting incident with Ralph Robinson. (R. 135-138). The prosecutor offered the possible explanation that a clerk erred in entering the wrong name of the victim. (R. 139). However, no evidence, other than the assertion of the prosecutor was introduced to show that the December 20 West Valley information was intended to charge a crime arising out of fight with Ralph Robinson, rather than a crime arising out of the shoplifting incident with David Bennion. (R. 128-148).

At the conclusion of the hearing, Judge Billings reversed her order to dismiss the aggravated assault charge. (R 145). She allowed the State to choose which information it would proceed under, the original information filed December 6, CR- 86-1692, or the second one with added charges filed January 7, CR- 86-500, pending before Judge Noel in Fifth Circuit Court. (R. 146). The same chose to proceed with the second information and dismissed the first. (R. 148).

On April 3, 1986, Judge Noel bound Mr. Miller over for trial in Third District Courton the second information. (R. 2). Mr. Miller was arraigned before Judge Billings on April 11, 1986. (R. 21). Trial was held on May 5, 1986. (R. 72). Mr. Miller was convicted of retail theft while armed with a deadly weapon, a second degree felony, aggravated assault, a third degree felony, and possession of a dangerous weapon by a restricted person, a third degree felony. (R. 27-30). Mr. Miller was sentenced on May 30, 1986. (R. 38-40).

The time from the arrest of Mr. Miller to his trial was five months. Mr. Miller was unable to obtain bail and was thus incarcerated in the County Jail for the entire period.

SUMMARY OF ARGUMENT

Leonard Miller was arrested on December 4, 1986 and tried on May 5, 1986. He was incarcerated for the entire period in the county jail. The delay between arrest and trial, under the facts of this case, constitutes a denial of Leonard Miller's right to a speedy trial. The delay was of sufficient length to trigger analysis of the Barker v. Wingo standard adopted by this Court in

State v. Hafen, 593 P.2d 538 (Utah, 1979). The delay was caused by clerical error, by law enforcement authorities, and by an unnecessary refileing of charges alleging a new crime which the facts of the incident clearly did not support. Mr. Miller expressed his concern and frustration with the delays at trial. (R. 75-76). In addition, Appellant Miller was substantially prejudiced by the unreasonable incarceration in the County Jail for five months, not only because of the inherent oppresiveness of the lengthy pretrial incarceration and the significant anxiety it caused, but because it effectively added an additional five months to the amount of time he otherwise would have served, under the Board of Pardons policy of not allowing credit for time served prior to trial.

In considering the four factors of the Barker test, appellant Miller contends that the circumstances, taken as a whole, show that his right to speedy trial was violated.

In addition, Mr. Miller contends that the trial court violated his right against double jeopardy by reversing its order to dismiss the aggravated assault charge. As shown by Mr. Miller in his hearing on the motion to dismiss, he had already pled guilty to a lesser offense of simple assault, charged by West Valley City on an information listing the victim as David K. Bennion. (R. 9) Mr. Miller contends that West Valley City charged him with misdemeanor assault arising out of the shoplifting incident. He further contends that his plea of guilty to the lesser included offense of disorderly conduct barred the state from prosecuting on aggravated assault. The trial judge erred in merely accepting the assertion of

the county prosecutor that the West Valley information intended to charge assault arising from a totally separate incident, and that the name of the victim and police report cited as basis were the result of clerical error.

ARGUMENT

POINT I

DELAY OF FIVE MONTHS BETWEEN ARREST AND TRIAL, CAUSED BY THE PROSECUTION, VIOLATED MR. MILLER'S CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL

The Sixth Amendment to the U. S. Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . ."

The United States Supreme Court has declared this right "fundamental" and therefore enforceable upon the States by operation of the Fourteenth Amendment. Klopper v. North Carolina, 386 U.S. 213, 222-223 (1967). Article 1, Section 12 of the Utah Constitution provides a similar guarantee, supported by legislative enactment of Utah Code Ann. Section 77-1-6(1)(f).

The right to a speedy trial is recognized as "one of the most basic . . . preserved by our constitution." Klopper, at 226. The function of this fundamental right is "to protect those accused of a crime against any possible delay, caused by either willful oppression, or the neglect of the state or its officers." People v. Wilson, 383 P.2d 452, 458 (1963). In Utah, "the speedy trial right reserved under the Utah Constitution is no greater or lesser than its federal counterpart." State v. Banner, 717 P.2d 1325, 1378, (Utah, 1986).

The United States Supreme Court in Baker v. Wingo, 407 U.S. 514 (1972) articulated a four prong balancing test to determine if a defendant has been denied a speedy trial. Length of delay, the reason for delay, defendant's assertion of the right to a speedy trial, and prejudice to the defendant are all factors to be considered. However, no factor is to be considered as a necessary or sufficient prerequisite to a claim. The four are related factors and must be considered together with such other circumstances that may be relevant. The Utah Supreme Court adopted this test in State v. Hafen, 593 P.2d 538 (Utah 1979).

The United States Supreme Court held that there is "no constitutional basis for holding that the speedy trial right can be quantified into a specific number of days or months." Barker at 523. The length of delay that is necessary to trigger inquiry into the other factors is a matter for the states to determine and that "because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case." Barker at 530-531. In gauging whether the delay is excessive, the Court in Barker indicated that the complexity of the charge is a primary factor. Ordinary street crimes will necessarily tolerate less delay than a complex conspiracy charge. Barker at 531.

Other guidance as to when delay becomes presumptively prejudicial and thus subject to the Barker analysis is given by the Utah Legislature and this Court. Perhaps most persuasive, and most applicable under these facts, is the guarantee of Utah Code Ann. 77-1-6(h). According to this statute, an accused who cannot make bail is entitled to a trial within 30 days after arraignment. This

30 day period has been held to be a statutory implementation of the right to a speedy trial under the Utah Constitution. State v. Rasmussen, 418 P.2d 134, (Utah, 1966). While this 30 day period is not mandatory, it is directory, and should be given substantial weight by this Court. State v. Lozano, 462 P.2d 710 (Utah 1979). In the instant case, Mr. Miller was unable to post bail. His arraignment on the first information was held before Judge Billings on January 3, 1986. (R. 137). Yet, because of delays caused by the prosecution, trial was not held until May 5, 1986. (R. 72). Appellant Miller thus contends that Utah Code Ann. Section 77-1-6(g) should weigh heavily in determining whether his right to a speedy trial was violated.

Further guidance is given by Utah Code Ann. Section 77-29-1. According to that statute, a trial must be brought within 120 days after a demand for disposition of detainers is filed by a prisoner. This Court has held that the 120 day period represents a legislative expression of the time limits that constitute a speedy public trial, under these circumstances, under the Utah Constitution. State v. Viles, 702 P.2d 1175 (Utah 1985). Mr. Miller's delay was substantially longer. In addition, this Court has previously employed a Barker analysis triggered by a delay of three and a half months between arrest and trial. State v. Knill, 656 P.2d 1026 (Utah 1982). Appellant contends that a delay of five months between arrest and trial for an ordinary street crime is sufficient delay to trigger a Barker analysis.

According to Barker, the length of the delay is analytically closely related to the reason for delay. Differing weights are assigned to varying reasons for the delay. For example,

purposeful delay on the part of the greatest weight. However, "negligence . . . should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than the defendant." Barker at 531.

In the instant case, the five month delay between arrest and trial was caused entirely by the law enforcement authorities. First, the law enforcement authorities erred either by listing the wrong date and place on the West Valley information, as contended by the defendant, or by listing the wrong victim and police report as contended by the prosecution. (R. 139). (See Addendum B). These errors caused all the confusion which led to the motion to dismiss, the order to dismiss, the motion to reconsider the order to dismiss and the reversal of the order to dismiss, all of which unreasonably delayed the trial. At the motion to dismiss the aggravated assault charge, all the parties, the Judge, the defendant and the prosecution, proceeded upon the belief that the West Valley Information was West Valley City's effort to prosecute a charge arising out of the shoplifting incident. (R. 115-126). However, the trial on the remaining retail theft charge was delayed by the prosecution's filing of a motion to reconsider based upon their interpretation of the clerical errors.

In addition to delays caused by the negligence of the law enforcement authorities, delay was also caused by the filing of a second information after Mr. Miller had been arraigned, went through preliminary hearing and was bound over to Third District Court on the first information. The primary reason for filing the second

information was to add the charge of aggravated robbery, (R. 125). A charge wholly unsupported by the facts of the incident and found so by the trial court. (R. 27-30). This required that another preliminary hearing be held before Judge Noel in Fifth Circuit Court on February 13, 1986, the date originally scheduled for trial on the first information. (R. 4) Yet more delay was caused because Judge Noel was forced to delay his decision to bind over for trial until Judge Billings was able to rule on the prosecution's motion to reconsider dismissal of the aggravated assault charge, (R. 131), a motion necessitated by its own errors.

Judge Billings rendered her decision on April 2, (R. 145). Judge Noel bound Miller over for trial on April 3. (R. 2). Trial was finally held on May 5, (R. 72) a full five months after Miller was arrested and approximately three months after Miller's original scheduled trial date. All during this time Mr. Miller was incarcerated in county jail, confused and frustrated by delays caused by prosecutorial errors and insistence upon overcharging.

The next factor in the Barker analysis is the defendant's assertion of his right to a speedy trial. As held in Barker, " a defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process. Moreover, . . . Society has a particular interest in bringing swift prosecutions, and society's representatives are the ones who should protect that interest." Barker at 527. The Court reasoned that a doctrine which demands "that a defendant

waives any consideration of his right to a speedy trial for any period to which he has not demanded a trial" is unconstitutional. Id. at 526.

"Such an approach, by presuming waiver of a fundamental right from inaction, is inconsistent with this Court's pronouncements on waiver of constitutional rights. The Court has defined waiver as "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464, 82 L. Ed. 1461, 1466, 58 S. Ct. 1019, 146 ALR 357 (1938). Courts should "indulge every reasonable presumption against waiver," Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393, 81 L. Ed. 1177, 1180, 57 S. Ct. 809 (1937), and they should "not presume acquiescence in the loss of fundamental rights." Ohio Bell Tel. Co. v. Public Utilities Comm'n, 301 U.S. 292, 307, 81 L. Ed. 1093, 1103, 57 S. Ct. 724 (1937)."

Barker v. Wingo, 407 U.S. 514, 526, (1972).

For these reasons the Court rejected the notion that a defendant who fails to demand a speedy trial, forever waives his right. Id. at 528. Instead, "the better rule is that the defendant's assertion or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right." Id. at 528. However, the Court also held that "the defendant's assertion of his speedy trial right is entitled to strong evidentiary weight in determining whether the defendant is being deprived of that right." Id. at 531-532.

The Baker Court held that the nature of the speedy trial right is such that it is impossible to pinpoint the precise time in the process when the right must be asserted. Id. at 527. In the instant case, counsel for Mr. Miller raised the issue of the delay in his opening statement at trial. (R. 75-76). He voiced his client's frustration with the avoidable delays attributable to the

prosecution, and brought to the Court's attention that his client waited approximately six months in jail as a result of the prosecutions actions. (R. 75-76) Mr. Miller contends that these comments clearly reflect his concern that his rights were violated by the prosecution and that they serve as an effective assertion of his right to a speedy trial for Barker analysis purposes.

The last step in the Barker analysis is to evaluate the prejudice to the defendant. Under Barker, "prejudice should be assessed in light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: i) to prevent oppressive pre-trial incarceration; ii) to minimize anxiety and concern of the accused; and iii) to limit the possibility that the defense will be impaired." Id. at 532.

Regarding the first of the above interests, Barker expresses concern that the obvious societal disadvantages of unreasonable pre-trial incarceration are even more serious for the accused who cannot obtain his release. Barker at 532. The detrimental impact of such incarceration is felt by the individual through the resulting loss of employment, disruption of family life, the enforcement of idleness, and the curtailment of rehabilitation. Id. The anxiety and concern of the accused caused by the delay between accusation and trial has long been recognized as central to the reason for the existence of the speedy trial right, United States v. Ewell, 383 U.S. 116 (1966), and virtually mandates the conclusion that a defendant is always prejudiced by such delay.

In the instant case, the accused, Mr. Miller, was incarcerated for the entire period between arrest and trial. (R. 75-76). Mr. Miller contends that the five month pre-trial incarceration under the cloud of confusion uncertainty and frustration caused by the prosecution in this case, was oppressive and caused him significant anxiety and concern.

Mr. Miller contends that he was also strongly prejudiced because he will not be credited for this pre-trial incarceration period in serving his sentence. According to Policy No. A09/12 of the Utah Board of Pardons, the Board will not grant credit for time served by an offender, other than time served by an offender committed to the Utah State Hospital pursuant to a guilty, but mentally ill conviction, or incarceration while undergoing diagnostic evaluations. UTAH BOARD OF PARDONS POLICY AND PROCEDURE MANUAL, No. A09/12, June 2, 1986. (Addendum F). Under this policy, the prosecution has the power to enhance a prisoners sentence by unreasonably delaying the prisoners trial through negligence or by design. In the instant case, Mr. Miller's trial was unreasonably delayed by the prosecution through negligence and recharging. Mr. Miller contends that he was especially prejudiced by this delay because, under official Board of Pardons policy, it is significantly added to his term of incarceration.

Because the facts of this case meet the four part Barker analysis, Appellant Miller asks this Court to find that his constitutional right to a speedy trial was violated, reverse the convictions below, and dismiss the charges.

POINT II

THE TRIAL COURT VIOLATED APPELLANT MILLERS
CONSTITUTIONAL RIGHT AGAINST DOUBLE JEOPARDY IN REVERSING
ITS ORDER TO DISMISS THE AGGRAVATED ASSAULT CHARGE

The Fifth Amendment to the United States Constitution provides that no person shall: "be subject for the same offense to be twice put in jeopardy of life or limb." The United States Supreme Court has declared the right against double jeopardy to be "fundamental" and thus incumbent upon the states by operation of the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784 (1969). Article I, Section 12 of the Utah Constitution provides a similar guarantee, supported by legislative enactment of Utah Code Ann. Section 77-1-6(2)(a) which states that "no person shall be put twice in jeopardy for the same offense."

According to Utah Code Ann. Section 76-1-402(3), a defendant may not be convicted of an offense, if he has already been convicted of a lesser included offense arising out of the same criminal episode. Mr. Miller was charged on December 20, with simple assault upon David K. Bennion in West Valley City. (R. 9). The basis for the charge was listed on the information as police report 85-29842, a report which described a December 4 shoplifting incident involving Mr. Miller and David Bennion. (R. 9). However, Mr. Miller was also charged with aggravated assault upon David Bennion by the State. The basis for the charge, listed in the probable cause statement, was police report 85-29842, the same police report used as the basis for the West Valley charge. (R. 9)

This Court has held that simple assault is a lesser included offense of aggravated assault. State V. Hunter, 437 P.2d 208 (Utah 1968). Mr. Miller pled guilty to disorderly conduct, a

lesser included offense of simple assault, on the West Valley information. (R. 11). Believing, therefore, that the guilty plea on the West Valley charge barred the State from prosecuting on the aggravated assault charge, Mr. Miller moved to dismiss that charge. The motion to dismiss was granted. (See addendum D).

On April 2, 1986, a hearing to reconsider the order for dismissal was held. (R. 128-148). The prosecution merely asserted, without presenting evidence, that West Valley in fact intended to prosecute Mr. Miller for a simple assault against one Ralph Robinson, arising out of a fighting incident that occurred on November 9, 1985. (R. 128-148). The prosecution asserted, with no evidence, that West Valley had not intended to prosecute Mr. Miller on an assault charge arising out of the shoplifting incident; that the listing of David Bennion as the victim, and the listing of shoplifting police report, as the basis of the charge, was a clerical error. (R. 139). The date listed on the West Valley information was the date of the fight with Ralph Robinson. (See Addendum B) (R. 6-9). The place listed was where the fight took place. (See addendum B)(R. 6-9). However, the Court did not consider the more reasonable interpretation that the date and place were a result of clerical error, rather than the name of the victim and police report. (R. 128-148).

Another factor apparently ignored by the trial court was the date the West Valley information was issued. The fight with Ralph Robinson occurred on November 9, 1985. (R. 6-8). Mr. Miller was ordered to appear and answer the charge on November 18, 1985. He failed to appear. A bench warrant was issued

for his arrest. On December 6, 1985 he was taken before Judge Burton and arraigned on simple assault charges against Ralph Robinson. Pre-trial was set, at that time for January 7, 1986. (R. 10). The only reasonable interpretation is that West Valley intended to do exactly what the information says on its face: charge simple assault as against David Bennion, arising out of the shoplifting incident.

All of these factors combined to give Mr. Miller and his counsel a reasonable bonafide belief that they had resolved at least the assault charge against David Bennion. Mr. Miller served his sentence on that charge in the county jail. (R. 11) Yet, based upon the mere assertion of the Salt Lake County Prosecutor that West Valley had not intended to prosecute the shoplifting incident, the trial court allowed the state to try Mr. Miller again for assault on Mr. Bennion. Mr. Miller was convicted and sentenced to 0 to 5 years on that charge. (R. 40). Mr. Miller contends that this is a clear violation of his right against double jeopardy, guaranteed by the Fifth Amendment of the United States Constitution, and Article I, Section 12 of the Utah Constitution. For this reason, Mr. Miller asks that his conviction on the charge of aggravated assault be reversed.

CONCLUSION

Appellant Miller contends that under the Barker analysis, adopted by this Court, his right to a speedy trial was violated. According to Barker, the only remedy available is dismissal of the charges. Barker at 522. Appellant therefore asks that this Court find that his right to a speedy trial was violated, reverse the lower Courts conviction and order that the charges be dismissed.

In addition, Mr. Miller contends that his right against double jeopardy was violated by the trial courts reinstatement of the aggravated assault charge against David Bennion, inasmuch as he had already been convicted, and served his sentence on a West Valley City prosecution of a lesser included charge arising out of the same criminal episode. For this reason, Mr. Miller asks that the conviction on the aggravated assault charge be reversed.

Respectfully submitted this 12 day of February, 1987.


EDWARD K. BRASS
Attorney for Appellant

DELIVERY CERTIFICATE

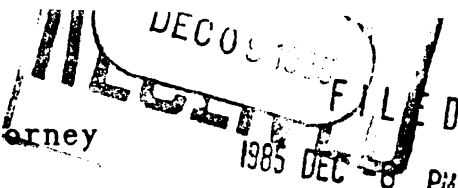
I hereby certify that four copies of the above Appellant's Brief will be delivered to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah, 84114, this 12 day of February, 1987.


EDWARD K. BRASS
Attorney for Appellant

DELIVERED by _____ this _____ day
of February, 1987.

ADDENDUM A

T.L. "TED" CANNON
Salt Lake County Attorney
By: JEFFREY THORPE
Deputy County Attorney
3839 South West Temple, Suite 1-A
Salt Lake City, Utah 84115
Telephone: (801) 264-2260



SALT LAKE DEPARTMENT

PH 12-17-85 2:0

Gibson

F85-2221

IN THE FIFTH CIRCUIT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH

Plaintiff,

v.

LEONARD GEORGE MILLER AKA

LEONARD G. MILLER

DOB 9-30-52

or 9-30-56)

Defendant(s).

) Screened by: THORPE

) Assigned to:

) BAIL ~~\$2500.00~~ \$10,000⁰⁰ MAB

) INFORMATION

) Criminal No.

85FS 2871

The undersigned, Det. Paul Jacobsen, under oath states on information and belief that the defendant(s) committed the crime of:

COUNT I

AGGRAVATED ASSAULT, a Third Degree Felony, at 1500 West 3500 South in Salt Lake County, State of Utah, on or about December 4, 1985, in violation of Title 76, Chapter 6, Section 103, Utah Code Annotated 1953, as amended, in that the defendant, LEONARD GEORGE MILLER AKA LEONARD G. MILLER, a party to the offense, did make a threat to do bodily injury to David K. Bennion, accompanied by an immediate show of force or violence, and did use a deadly weapon or such means or force likely to produce death or serious bodily injury;

COUNT II

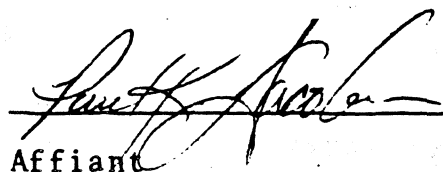
RETAIL THEFT, a Second Degree Felony, at 1500 West 3500 South, in Salt Lake County, State of Utah, on or about December 4, 1985, in violation of Title 76, Chapter 6, Section 602(1), Utah Code Annotated 1953, as amended, in that the defendant, LEONARD GEORGE MILLER AKA LEONARD G. MILLER, a party to the offense, did take possession of, conceal, carry away, transfer or cause to be carried away or transferred, merchandise displayed, held, stored, or offered for sale in a retail mercantile establishment, to-wit: Food-4-Less, such merchandise consisting of one case of beer and one carton of cigarettes, and that said defendant did so with the intention of retaining such merchandise or with the intent to permanently deprive said merchant of the possession, use or benefit of such merchandise, without paying the retail value of such merchandise, to-wit: under \$100.00, and that said defendant was armed with a deadly weapon at the time of the theft, to-wit: a hunting knife;

85FS 02871

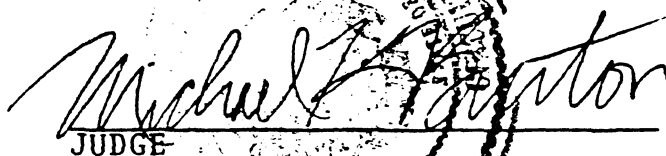
PROBABLE CAUSE STATEMENT: Based upon West Valley Police Department Report Case No. 85-029842, which details that the defendant, Leonard George Miller, at the above date and location, took possession of one case Budweiser Beer and one carton Marlborough cigarettes from the display area of a Food-4-Less Store and left the store with this merchandise without paying the retail value of such merchandise. When the defendant was stopped by a store clerk, David K. Bennion, and was questioned as to why he did not pay for said merchandise, the defendant pulled a deadly weapon from his belt, to-wit: a black handled hunting-type knife, and used the knife in a threatening manner against the store clerk which allowed him to make an escape from the store premises. The defendant was apprehended and returned to the store by police officers later that night at which time he was identified by the store clerk as the person who had committed the above offenses.

THIS INFORMATION IS BASED ON EVIDENCE OBTAINED FROM THE FOLLOWING WITNESSES:

Officer Simpson
Officer Fluckinger
Det. Paul Jacobsen
David K. Bennion
Food-4-Less c/o David Bennion
Ted Elder

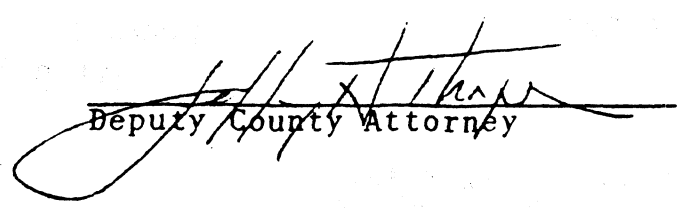

Affiant

Subscribed and sworn to before me
this 6 day of December, 1985.


JUDGE

Authorized for presentment and filing:

T.L. "TED" CANNON, County Attorney


Deputy County Attorney

ADDENDUM B

176
Leonard
3 B 7

IN THE CIRCUIT COURT, STATE OF UTAH, SALT LAKE COUNTY
WEST VALLEY DEPARTMENT

WEST VALLEY CITY,
A Municipal Corporation,

Plaintiff,

vs.

MILLER, LEONARD G.
1631 West 2700 South
West Valley City, UT

DOB: 09/30/56

Defendant.

FILED IN CLERK'S OFFICE
Salt Lake County, Utah

FEB 14 1986

H. Dixon Hindley, Clerk 3rd Dist. Court
By [Signature] Deputy Clerk

INFORMATION

NO. 85 CRWV 5535-R

CR 85-169c

STATE OF UTAH)
) ss.
County of Salt Lake)

Detective S. Coxey, WVC# V64 of West Valley City, in the County of Salt Lake, State of Utah on behalf of said City, on oath complains that the above-named defendant whose other and true name is to complainant unknown, of West Valley City, the County of Salt Lake and State of Utah, on 9 November 1985, at 1476 West Parkway, West Valley City, in the County of Salt Lake and State aforesaid, unlawfully did commit the public offense of VIOLATING A CITY ORDINANCE, as follows, to-wit: Count 1 - Defendant used unlawful force and violence towards David K. Bennion.

contrary to the provisions of Section(s) Count 1 - 13-5-102; ASSAULT

of Revised Ordinances of West Valley City, in such cases made and provided.

Complainant

SUBSCRIBED and sworn to before me this 20 day of December
A.D. 1985.

PRETRIAL 1/7/86 KS 10:00

85-29842

- SAME police report NUMBER
ON Felony Charge.

[Signature]
Circuit Court Judge

ADDENDUM C

T.L. "TED" CANNON

County Attorney

By: DAVID S. WALSH

1986 JAN -9 AM 11: 34

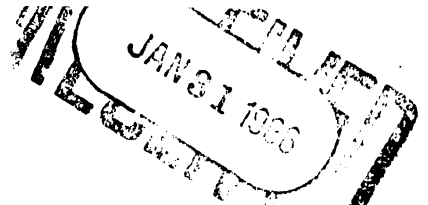
Deputy County Attorney

Courtside Office Building

231 East 400 South, 3rd Floor

Salt Lake City, Utah 84111

Phone: (801) 363-7900



PH 2-13-86 9:30

Noel

F86-251

IN THE FIFTH CIRCUIT COURT, SALT LAKE DEPARTMENT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

1-31-86

THE STATE OF UTAH,

Plaintiff,

v.

LEONARD GEORGE MILLER

DOB 09/30/52,

Defendant(s).

) Screened by: D S Walsh

) Assigned to: D S Walsh

) BAIL Summons

) INFORMATION

) Criminal No.

86FS

5028

The undersigned Jacobson - WVPD under oath states on information and belief that the defendant(s) committed the crimes of:

COUNT I

AGGRAVATED ROBBERY, a First Degree Felony, at 1500 West 3500 South, in Salt Lake County, State of Utah, on or about December 4, 1985, in violation of Title 76, Chapter 6, Section 302, Utah Code Annotated 1953, as amended, in that the defendant, LEONARD GEORGE MILLER, a party to the offense, unlawfully and intentionally took personal property in the possession of another from the person or immediate presence of another, against his will, by the use of a knife or a facsimile of a knife;

OR IN THE ALTERNATIVE

RETAIL THEFT, a Second Degree Felony, at 1500 West 3500 South, in Salt Lake County, State of Utah, on or about December 4, 1985, in violation of Title 76, Chapter 6, Section 602(1), Utah Code Annotated 1953, as amended, in that the defendant, LEONARD GEORGE MILLER, a party to the offense, did take possession of, conceal, carry away, transfer or cause to be carried away or transferred, merchandise displayed, held, stored, or offered for sale in a retail mercantile establish-

(Continued on page Two)

INFORMATION

STATE v. LEONARD GEORGE MILLER
County Attorney #85-1-68354
Page Two

ment, to-wit: Food-4-Less, such merchandise consisting of beer and cigarettes, and that said defendant did so with the intention of retaining such merchandise or with the intent to permanently deprive said merchant of the possession, use or benefit of such merchandise, without paying the retail value of such merchandise, and defendant ~~has twice been convicted of theft;~~ *weapon on the person*

COUNT II

AGGRAVATED ASSAULT, a Third Degree Felony, at 1500 West 3500 South, in Salt Lake County, State of Utah, on or about December 4, 1985, in violation of Title 76, Chapter 5, Section 103, Utah Code Annotated 1953, as amended, in that the defendant, LEONARD GEORGE MILLER, a party to the offense, assaulted David K. Bennion, by threatening to do bodily injury to David K. Bennion accompanied by a show of immediate force or violence, by the use of a deadly weapon, to-wit: a knife;

COUNT III

POSSESSION OF A DANGEROUS WEAPON BY RESTRICTED PERSON, a Third Degree Felony, at 1500 West 3500 South, in Salt Lake County, State of Utah, on or about December 4, 1985, in violation of Title 76, Chapter 10, Section 503, Utah Code Annotated 1953, as amended, in that the defendant, LEONARD GEORGE MILLER, a party to the offense, did have in his possession a dangerous weapon, to-wit: a knife, while on parole for a felony;

THIS INFORMATION IS BASED ON EVIDENCE OBTAINED FROM THE FOLLOWING WITNESSES:

Simpson Fluckinger Paul Jacobsen David K Bennion Ted Elder
Kevin Kenna

PROBABLE CAUSE STATEMENT:

Based upon West Valley Police Department report case 85-29842 which details that the defendant, Leonard George Miller, on or about December 4, 1985 at approximately 1720 at 1500 West 3500 South, West Valley City, took possession of 1 case Budwiser beer and 1 carton Marlborough cigarettes from the display area of Food-4-Less store and left the store with this merchandise without paying the retail value of such merchandise. When the defendant was stopped by a store clerk, David K. Bennion, and was questioned as to why he did not pay for said merchandise, the defendant pulled a deadly weapon from his belt, to-wit: a black handled hunting-type knife, and used

(Continued on page Three)

86FS

5028

INFORMATION

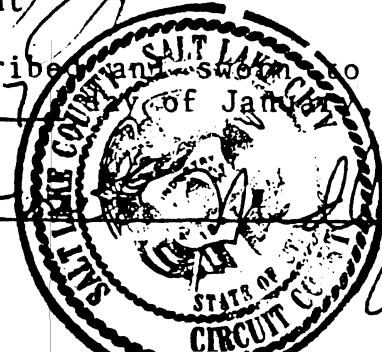
STATE v. LEONARD GEORGE MILLER
County Attorney #85-1-68354
Page Three

the knife in a threatening manner against the store clerk which allowed him to make an escape from the store premises. The defendant was apprehended and returned to the store by police officers later that night at which time he was identified by the store clerk as the person who had committed the above offenses.

Paul H. Jackson
Affiant

Subscribed and sworn to before me
this 7 of January, 1986.

Ray
Judge



Authorized for presentment and
filing:

T.D. "TED" CANNON, County Attorney

John F. Morgan, Deputy

ADDENDUM D

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	MEMORANDUM DECISION
Plaintiff,	:	CASE NO. CR-85-1692
vs.	:	
LEONARD GEORGE MILLER,	:	
Defendant.	:	

Defendant's Motion to Dismiss came before the Court on January 31, 1986. The defendant was represented by James Valdez, Esq., and the State was represented by Dave Walsh, Esq. The Court took the matter under advisement, to review the legal authorities submitted, and is prepared to enter its Findings of Fact and Conclusions of Law as incorporated in this Memorandum Decision.

FACTS

This matter arises out of a single criminal episode occurring on December 4, 1985 in West Valley City, Utah. The defendant was charged with assault, a misdemeanor, in the West Valley Circuit Court. According to the statements of counsel for the defendant, and uncontroverted by the State, the defendant, as a result of plea negotiations, pled guilty to disorderly conduct as a lesser included offense of assault. The defendant was subsequently charged as a result of the same criminal episode

in the Third District Court with aggravated assault and retail theft, both charges being felonies. Defendant brings this Motion, arguing that the aggravated assault charge in the District Court should be dismissed in view of the fact that the defendant has pled guilty to a lesser included offense thereof.

OPINION

I. Lesser Included Offense

Utah Code Ann., Section 76-1-402(3), states:

A defendant may be convicted of an offense included in the offense charge but may not be convicted of both the offense charged and the included offense. An offense is so included when:

(a) It is established by proof of the same or less than all of the facts required to establish the commission of the offense charged. . . .

The above statutory provision clearly states that a defendant may not be convicted of an offense if he has already been convicted of a lesser included offense arising out of the same criminal episode.

In Farrow v. Smith, 541 P.2d 1107 (Utah 1975), the Utah Supreme Court explained when an offense is a lesser included offense of a greater charge.

The rule as to when one offense is included in another is that the greater includes a lesser one when establishment of the greater would necessarily include proof of all of the elements necessary to prove the lesser.

Conversely, it is only when the proof of the lesser offense requires some element not involved in the greater offense that the lesser would not be an included offense.

Id. at 29 (quoting State v. Brennan, 13 Utah 2d 195, 371 P.2d 27 (1962)).

The defendant was charged in Circuit Court with assault, a misdemeanor. After plea negotiations, the defendant agreed to plead guilty to a charge of disorderly conduct as a lesser included offense of the misdemeanor assault charge. To allow the State to now argue contrary to what they stipulated to in the Circuit Court would frustrate the plea agreement.

The question which must be answered, therefore, is whether or not the defendant was convicted in the Circuit Court of a lesser included offense of the aggravated assault charge brought in the District Court. Utah Code Ann., Section 76-5-103 (1953) sets forth the elements of aggravated assault, and states that: "A person commits aggravated assault if he commits assault" and also engages in certain conduct in addition to that assault. In view of the definition of a lesser included offense set forth in the Farrow case quoted above, it appears clear that assault is a lesser included offense of aggravated assault inasmuch as the commission of aggravated assault necessarily includes all of the elements of common assault. The Utah Supreme Court, in State v. Hunter, 20 Utah 2d 284, 437 P.2d 208 (1968), expressly held that simple assault is a lesser included offense of aggravated assault. It follows, therefore, that the disorderly conduct

charge, being a lesser included offense of simple assault, is in turn a lesser included offense of aggravated assault. The defendant, therefore, pursuant to Section 76-1-402, Utah Code Ann., cannot be lawfully convicted of the greater aggravated assault charge inasmuch as he has already been convicted of a lesser included offense arising out of a single criminal episode.

II. Retail Theft Charge

The defendant is also charged in this Court with a retail theft charge, a second degree felony. Although the oral arguments of counsel were unclear, it appears necessary to address the issue of whether or not this charge may be properly brought in the District Court after the defendant was convicted in the Circuit Court on the assault/disorderly conduct charge. Utah Code Ann., Section 76-1-402(2) states that:

Whenever conduct may establish separate offenses under a single criminal episode, unless the court otherwise orders to promote justice, a defendant shall not be subject to separate trials for multiple offenses when:

- (a) The offenses are within the jurisdiction of a single court, and
- (b) The offenses are known to the prosecuting attorney at the time the defendant is arraigned on the first information or indictment.

At the time of oral argument on defendant's Motion to Dismiss, counsel for the State brought the above provision to the attention of the Court, and argued that it did not preclude, and offered case law to the effect that it did not preclude additional proceed-

ings on the retail theft charge in the District Court under the circumstances of the present matter. It is unclear whether or not defense counsel was making such objection, but inasmuch as counsel for the State felt it necessary to handle such issue, the Court will also briefly address that issue.

At first blush, Section 76-1-402(2) suggests that all of the charges against the defendant arising out of the single criminal episode must be brought in a single trial. Although the District Court had jurisdiction of all of the offenses charged here, the defendant had the right to keep the misdemeanor assault charge in the Circuit Court, and the District Court was powerless to take the matter from the Circuit Court. State v. Sosa, 598 P.2d 342, 344 (Utah 1979). Furthermore, the Circuit Court did not have any jurisdiction over the felony retail theft charge, and therefore could not dispose of that matter. The Utah Supreme Court has held that Section 76-1-402(2) does not require a single trial where the separate charges could not be brought or handled in a single court, as is the case here. State v. Sosa, 598 P.2d 342, 344 (Utah 1979). Defendant chose to plead to the misdemeanor assault charge in the Circuit Court, as it was his right to, and thereby precluded the District Court from handling the matter. On the other hand, the felony theft charge brought in the District Court could not have been handled in the Circuit Court. To interpret Section 76-1-402 so as to allow the defendant

to force the disposition of a misdemeanor in the Circuit Court and thereby escape prosecution for a felony arising out of a single criminal episode would be a complete frustration of justice. The felony retail theft charge against the defendant, therefore, may be properly brought in the District Court.

CONCLUSION

The defendant cannot be tried for the aggravated assault charge in the District Court inasmuch as he has already been convicted of a lesser included offense. The defendant's Motion to Dismiss as to the aggravated assault charge is, therefore, granted. The felony retail theft charge, however, is still a viable charge and is properly brought in this District Court. Defendant's Motion to Dismiss as to the remaining felony retail theft charge, therefore, is denied.

Dated this 5 day of February, 1986.


JUDITH M. BILLINGS
DISTRICT COURT JUDGE

ADDENDUM E

T. L. "TED" CANNON
Salt Lake County Attorney
DAVID S. WALSH
Deputy County Attorney
231 East 400 South, Third Floor
Salt Lake City, Utah 84111
Telephone: (801)363-7900



IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,)	MOTION TO RECONSIDER
)	COURT ORDER.
Plaintiff,)	
v)	Criminal No. CR 85-1692
LEONARD GEORGE MILLER,)	Hon. Judith M. Billings
Defendant.)	

COMES now the State of Utah and moves this Court to reconsider its Order dismissing portions of Case No CR 85-1692. This Motion is based upon the grounds that the defendant misrepresented certain facts to this Court at the time of the hearing on the Motion to Dismiss. Specifically, the defendant has represented that this case was pled from a simple assault to a disorderly conduct. In fact, there were two assault charges filed against the defendant. The first charge, and one which was handled by the West Valley City Attorney, occurred on 9 November 1985 at 1476 West Parkway. A second assault charge, the one pending before this Court, was an aggravated assault which occurred on December 4, 1985, at 1500 West 3500 South in West Valley City.

Defendant has represented that there was only one charge, when in fact, there were two. The City Attorney had no authority to bind the State and in fact made no representation that he was binding the State. The defendant

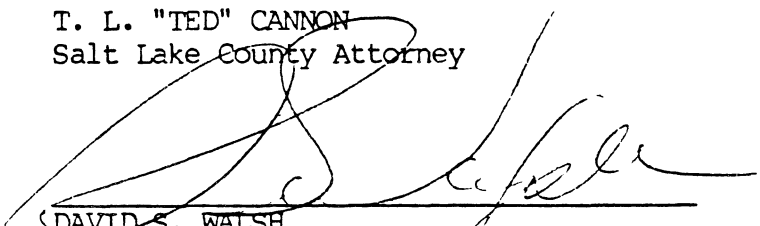
MOTION TO RECONSIDER COURT ORDER
CR 85-1682
Page 2

has attempted to mislead this Court and the State by revealing only half the truth.

WHEREFORE, the State of Utah prays that this Court hold a hearing at which these matters may be more fully explored and a fair and proper resolution reached.

RESPECTFULLY SUBMITTED this 21st day of FEBRUARY, 1986.

T. L. "TED" CANNON
Salt Lake County Attorney



DAVID S. WALSH
Deputy County Attorney

ADDENDUM F

UTAH BOARD OF PARDONS
POLICY AND PROCEDURE MANUAL

Number: A09/12 Date: June 2, 1986 Page 1 of 2

Title: Granting Credit for Time Served

Authority: Utah Code Annotated 77-27-5
Utah Code Annotated 77-27-9(3)
Utah Code Annotated 76-3-404
Utah Code Annotated 77-35-21.5
Attorney General's Opinion Dated October 26, 1978

Purpose: To establish the Board of Pardons' policy on granting credit for time served prior to commitment to the prison.

Policy: It is the policy of the Board of Pardons to grant an offender credit for time served prior to commitment to prison only as required by state law.

Credit will be given for all time served by an offender committed to the Utah State Hospital pursuant to a "guilty and mentally ill" conviction. Credit will also be given for up to 180 days served by an offender while undergoing diagnostic evaluations.

No other time served while awaiting trial and sentencing or as a condition of probation prior to commitment to prison will be credited toward an individual's sentence.

Original Issue Date:

Revision Date:

5294C