

1998

STATE OF UTAH, Plaintiff and Appellee, vs.
DENNY DUKE KANDT, Defendant and
Appellant : Reply Brief

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS
STATE OF UTAH**

STATE OF UTAH,)	
)	
Plaintiff-Appellee,)	
)	
vs.)	No. 980230-CA
)	Priority: 2
)	
DENNY DUKE KANDT,)	
)	
Defendant-Appellant.)	<i>all parties listed on cover</i>

REPLY BRIEF OF APPELLANT

**An Appeal in a Criminal Information from the Third Judicial District Court,
the Honorable Sandra Pueler, Presiding**

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,)	
)	REPLY BRIEF
Plaintiff-Appellee,)	
)	
vs.)	Case No: 980230-CA
)	
DENNY DUKE KANDT)	Property No: 2
)	
Appellant/Claimant)	

REPLY BRIEF OF THE APPELLANT/CLAIMANT, DENNY DUKE KANDT

ARGUMENT

I
THE PREJUDICE OF THE ERRORS DETAILED AS TO EFFECTIVE ASSISTANCE OF COUNSEL SHOULD BE ANALYZED IN LIGHT OF CIRCUMSTANTIAL EVIDENCE AS TO THE DEFENDANT’S GUILT

The Defendant submits that the Court in reviewing both the claim for ineffective counsel and for insufficiency of evidence should consider the flimsy nature of the basic case presented against the Defendant. In the *Brief of Appellee*, the State argues that there was sufficient evidence that Mr. Kandt was somehow aided or abetted the assault committed by Anthony Wallace. The State indicates that the Jury could find that even if

the Defendant did “nothing more than drive the car, stand lookout, watch as others assaulted Dino, took Dino’s pager and brag about it to others“ the jury could reasonable infer that the Defendant was guilty of aiding or abetting.

The State has argues that, on one hand, the evidence which the Defendant submits his counsel should have objected to and not received as evidence is not error. Then on the other hand, the State submits that the same questionable evidence introduced at trial supports the sufficiency of the weak circumstantial case of aiding and abetting against the Defendant. See for example, page 28 and 29 of the *Brief of Appellee* where the State argues because “the victim implied that the Defendant retrieved the victim’s pager at the assault scene and later called his friends to brag about who he was and the assault of the victim”. This is specific evidence which the Defendant indicated that his attorney should have objected and if an objection was made the evidence would have not been used as evidence. The State uses this argument to use that the hearsay evidence of alleged bragging about the assault to others was in some matter evidence which the jury could consider to infer that he was guilty of aiding and abetting.

Also, see page 27 of the *Brief of Appellee* where the State argues that the Gang evidence was a basis to identify the Defendant by showing motive for the assault. The State argues that is evidence to establish motive in light of the lack of evidence and fact

and claims this was purported trial strategy of the offense counsel.

As an issue of trial strategy, the Defendant submits that an objective review of the evidence will show that such a strategy was not a reasonable strategy in light of the very weak evidence which was introduced at trial and in light of the Defendant's evidence. The defense should have simply been based upon the alibi defense and the Defendant's testimony. The prejudicial gang evidence was not necessary. Even if that was a trial strategy much of the evidence should have been objected to because it was irrelevant until the State proved an assault, not before such proof was entered. The ruling broadened the scope of membership of the gangs to involve threats of retaliation and fear which can only be prejudicial in light of the very weak evidence offered at trial.

POINT II

THE DEFENDANT IS ENTITLED PURSUANT TO A UTAH SUPREME COURT CASE TO HAVE THE GANG ENHANCEMENT CONVICTION SET ASIDE AND HAVE THE DEFENDANT

The Defendant was sentenced without a jury verdict pursuant to the gang enhancement statute¹, *Utah Code Annotated* Section 76-3- 203.1(5)(c) which provides:

¹At a Jury trial, the Appellant was convicted of Aggravated Assault as charged in the Information. The conviction was enhanced based upon the "gang enhancement" of *Utah Code Annotated* Section 76-3-203 1 (c) to a term of three years to run concurrently with the sentence of five to life for the charge of Aggravated Assault. (See Judgment and Sentence attached in Appendix to Brief on Appeal.)

"(c) The sentencing judge rather than the jury shall decide whether to impose the enhanced penalty under this section. The imposition of the penalty is contingent upon a finding by the sentencing judge that this section is applicable. In conjunction with sentencing the court shall enter written findings of fact concerning the applicability of this section."

In the recent decision of *State v. Lopes*, 1999 Utah 24, No. 960551, (Utah 03/16/1999), the Court ruled:

This section of the enhancement statute directs the judge to become the fact finder, expressly taking that power away from the jury. In this case, the judge followed the statute and became the fact finder. Even though Lopes pled guilty to the underlying offense, his plea did not establish the requisite mental state of the other actors, as is necessary to support imposition of the gang enhancement. His plea, then, did not establish all of the elements of the enhancement offense beyond a reasonable doubt. The trial judge supplemented the plea by making the factual finding that the elements of the gang enhancement were established, and implemented the enhancement. This clearly violated article I, section 12 of the Utah Constitution because, absent waiver, only a jury has the ability to determine when elements of a crime are established beyond a reasonable doubt. Therefore, we find subsection (5)(c) of 76-3-203.1 of the Code unconstitutional....

We hold that the gang enhancement statute creates a new and separate offense and, therefore, the Code requires each element of this crime be proved beyond a reasonable doubt. Since the elements of the crime were not established against Lopes, either by his plea or by a jury trial, he was deprived of his due process rights as guaranteed by the federal and Utah constitutions. Furthermore, subsection (5)(c) of Utah Code Ann. 76-3-203.1 is found to violate a defendant's right to a jury trial as established in the Constitution of the State of Utah. We reverse and remand for a new trial on the section 76-3-203.1 charge.

Therefore the Defendant request that the Court Order pursuant to *State v. Lopes* that gang conviction and enhancement be reversed.

CONCLUSION

The Defendant submits that the Court should consider the objective and admissible evidence which could have been introduced against the Defendant in evaluating counsel's use of the gang strategy. The problems raised by the Defendant are objective errors concerning other evidence which was received at trial. The Defendant respectfully requests that the Court to reject the argument that the initial evidence was not prejudicial and later in the brief arguing the same evidence which was the basis for sustaining the verdict. The Appellant respectfully requests that a new trial be awarded.

DATED this ____ day of April, 1999.

RANDALL GAITHER
Attorney for Claimant

MAILING CERTIFICATE

I hereby certify that on the 19 day of April, 1999, a true and correct copy of the foregoing REPLY BRIEF was mailed, First Class, postage prepaid to:

KRIS C. LEONARD
ASSISTANT ATTORNEY GENERAL
160 EAST 300 SOUTH, 6TH FLOOR
P.O. BOX 140854
SALT LAKE CITY, UTAH 84114-0854

DATED this 19 day April, 1999.

A handwritten signature in black ink, appearing to read "Kris C. Leonard", is written over a horizontal line.

Therefore the Defendant request that the Court Order pursuant to *State v. Lopes* that gang conviction and enhancement be reversed.

CONCLUSION

The Defendant submits that the Court should consider the objective and admissible evidence which could have been introduced against the Defendant in evaluating counsel's use of the gang strategy. The problems raised by the Defendant are objective errors concerning other evidence which was received at trial. The Defendant respectfully requests that the Court to reject the argument that the initial evidence was not prejudicial and later in the brief arguing the same evidence which was the basis for sustaining the verdict. The Appellant respectfully requests that a new trial be awarded.

DATED this 14 day of April, 1999.



RANDALL GAITHER
Attorney for Claimant