

1998

# State of Utah v. Steven Max Elliot : Brief of Appellee

Utah Court of Appeals

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UTAH COURT OF APPEALS  
BRIEF

UTAH  
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IN THE UTAH COURT OF APPEALS

981616

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STATE OF UTAH, :  
Plaintiff/Appellee, : Case No. 981616-CA  
vs. :  
STEVEN MAX ELLIOT, : Priority No. 2  
Defendant/Appellant. :

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BRIEF OF APPELLEE

APPEAL FROM A CONVICTION FOR ABSCONDING FROM  
PAROLE SUPERVISION, A THIRD DEGREE FELONY, IN  
VIOLATION OF UTAH CODE ANN. § 76-8-309.5(2) (1996), IN THE  
SECOND DISTRICT COURT, WEBER COUNTY, STATE OF UTAH,  
THE HONORABLE W. BRENT WEST, PRESIDING.

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**FILED**  
Utah Court of Appeals

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Julia D'Alesandro  
Clerk of the Court

IN THE UTAH COURT OF APPEALS

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**IN THE UTAH COURT OF APPEALS**

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**Plaintiff/Appellee,** : **Case No. 981616-CA**

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**STEVEN MAX ELLIOT,** :

**Defendant/Appellant.** :

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**BRIEF OF APPELLEE**

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**JURISDICTION AND NATURE OF PROCEEDINGS**

Defendant appeals his conviction for absconding from parole supervision, a third degree felony, in violation of Utah Code Ann. § 76-8-309.5(2) (1997). This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(e) (1997).

**STATEMENT OF THE ISSUES AND STANDARD OF REVIEW**

The only issue raised in this appeal is whether there was sufficient evidence presented at trial to support the jury's verdict. When reviewing a jury verdict for sufficiency of the evidence, this Court must "review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict of the jury . . . [and] reverse a jury conviction for insufficient evidence only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that

reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted." *State v. Hamilton*, 827 P.2d 232, 236 (Utah 1992).

In addition, a claim of insufficient evidence will not be reviewed unless the appellant marshals the evidence supporting the jury's verdict and demonstrates how the evidence, and the reasonable inferences therefrom, is insufficient to support the verdict. *State v. Pilling*, 875 P.2d 604, 607-08 (Utah App. 1994).

### **CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES**

#### **Utah Code Ann. § 76-8-309.5(2) and (4)(b)(iii) (1997):**

(2) An offender absconds from supervision when he willfully changes the residence that he reported as his correct address without notifying his parole officer or obtaining permission.

(4)(b) "Offender" means a person who has been convicted of a crime and has been: . . .

(iii) placed on parole under condition that he report to a parole officer on a regular basis . . . .

### **STATEMENT OF THE CASE**

Defendant, a Utah State Prison parolee, was charged with absconding from parole supervision, a third degree felony, in violation of Utah Code Ann. § 76-8-309.5(2) (1997) (R.1). The charge was tried before a jury on July 28, 1998 (R. 17). At the close of the state's evidence, defendant moved for a directed verdict based upon the sufficiency of the evidence, which motion was denied by the trial court (R. 81: 135-

36). Defendant was convicted by the jury, and the court sentenced him to 0-5 years in prison, to be served consecutively with other charges (R. 64).

### **STATEMENT OF FACTS**

On August 19, 1997, defendant was paroled from Utah State Prison and was given notice of his reporting requirements and of the state law regarding absconding (R. 81: 106-108, 110).

Defendant found work remodeling a building located at 1462 Washington Boulevard in Ogden. When the remodeling work on one of the upstairs apartments in that building was partially completed, defendant moved into that apartment while he continued his work on it and the rest of the apartments in the building. A friend of defendant's, Robbie Rhodes, was also employed by the owner of the building to assist in the remodeling. Rhodes was also on probation, and was then residing in a halfway house (R.81:81-85).

In January 1998, defendant tested positive for use of cocaine, and he was instructed to report to his probation officer, Glen Ercanbrack, on January 13, 1998. When defendant failed to report as instructed, Ercanbrack went to defendant's reported residence to try and find him. Although it was after defendant's 7:00 p.m. curfew, defendant was not at the apartment, and his vehicle, a brown Mazda pickup, was missing (R.81:111-115).

On January 15, 1998, Ercanbrack received a phone call from defendant. Defendant told Ercanbrack that he knew a warrant had been issued for his arrest. Ercanbrack told defendant to remain where he was, and Ercanbrack would come out to defendant's residence to talk to him. When Ercanbrack arrived at defendant's apartment, defendant was not there, and his truck was gone (R.81:115).

At that point, Ercanbrack and his partner, Chad Oberhansley, went to the halfway house where Robbie Rhodes resided to see if Rhodes knew where defendant had gone (R.81:115-116). Rhodes informed Ercanbrack that defendant had told Rhodes that he was leaving and was not going to return, and that defendant had asked Rhodes to pack up the rest of defendant's property in the apartment and to pick up some tools that defendant had left at a job site (R.81:116).

Ercanbrack and Oberhansley then contacted defendant's landlord and gained access to defendant's apartment. Ercanbrack noted that some of defendant's property was missing, "and that there was just scattered debris in the apartment" (R.81:116). Ercanbrack gave the landlord his business card, and requested that the landlord contact him if he ever saw defendant. The landlord never called Ercanbrack to report that he had seen defendant. (R.81:118).

Robbie Rhodes continued working full time at the apartment building daily, including sometimes on Saturday and Sunday, for about three months (R.81:87). During this time, Rhodes never saw defendant at the apartment, and never saw

defendant's truck parked there. Rhodes continued working on the remodeling of the building, including defendant's apartment (R.81:88, 91-92). At some point during this time, defendant's father came to the apartment and removed all of defendant's belongings (R.81:91).

On January 21, 1998, defendant left a voice mail message for Ercanbrack indicating that he was at the Ogden Regional Detox Center, and that he would be there for a twenty-nine day program (R.81:118). Ercanbrack immediately drove to the Center, but defendant was no longer there. Ercanbrack was told by the staff that defendant had checked in and out, and never stayed long (R.81:119).

Following defendant's disappearance, Ercanbrack would drive by the apartment once or twice a week, at night, to see if defendant ever returned (R.81:119). There were never any lights on in the apartment, and defendant's vehicle was never parked at the building (R.81:119). Ercanbrack had no knowledge of defendant's location until March 17, 1998, when defendant was arrested in Pioneer Park in Salt Lake City for possession of heroin (R.81:120).

## **ARGUMENT**

### **THE JURY'S VERDICT IS SUPPORTED BY AMPLE EVIDENCE THAT DEFENDANT CHANGED HIS RESIDENCE WITHOUT NOTIFYING HIS PAROLE OFFICER**

In this appeal, defendant argues only that there is insufficient evidence in the record to support his conviction. Brief of Appellant, p. 6. Although defendant's brief

gives lip service to the requirement that he marshal all of the evidence which supports his conviction, the brief fails to acknowledge most of the strongest evidence which the State presented at trial, and this failure to marshal the evidence constitutes a waiver of defendant's right to have his insufficiency claim considered on appeal. *State v.*

*Gallegos*, 851 P.2d 1185, 1189 (Utah App. 1993). In his brief, defendant argues that there is insufficient evidence because the State proved only the following facts at trial:

- a. Defendant's parole officer was unable to find defendant following a failed urine test.
- b. Defendant contacted his parole officer to inform him that he was going into drug treatment.
- c. Defendant told Robbie Rhodes that defendant was going to leave and wanted Rhodes to box up his things.<sup>1</sup>

Even these bare facts should be considered sufficient to support the jury's verdict, in that these facts provide evidence that defendant could no longer be found at

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<sup>1</sup> In presenting his version of the state's evidence, defendant also makes several factual assertions that were not part of the record, and which are misleading. Defendant states, without citation to the record, that when the probation officer searched defendant's apartment, "all of defendant's property remained in the apartment" except a guitar and a television set, when the probation officer actually testified that some of defendant's property was missing, that there was just "scattered debris" at the apartment (R.81:116), and that clothing was missing (R.81:134). Defendant also asserts, again without citation to the record, that the apartment was not re-rented to anyone else. Even if it is assumed (in the absence of any evidence) that this is true, such would be expected even if defendant had abandoned the apartment, given the fact that defendant was living in the apartment while it and the rest of the building were undergoing renovation.

the apartment, and that he intended to pack up his property and leave. However, defendant has failed to acknowledge in his brief much of the significant evidence which was presented at trial, including the following:

- a. Defendant told Robbie Rhodes that he was leaving and would not be returning (R.81:116).
- b. Defendant's parole officer found that some of defendant's property was missing from the apartment, including some of his clothing (R.81:116, 134).
- c. Rhodes never saw defendant or his truck at the apartment even though Rhodes was at the building every day, all day, for several months, and even continued the renovation of defendant's abandoned apartment (R.81:87-88, 91-92).
- d. Defendant's parole officer could never find defendant or his truck at the apartment even though he checked it several times a week, at night (R.81:119).
- e. Defendant's father came to the apartment, packed up all of defendant's remaining belongings and took them away (R.81:91).
- f. Defendant's landlord agreed to call the probation officer if he ever saw defendant, and never called the officer to report that he had seen defendant (R.81:118).
- g. Defendant checked into a drug treatment center, but checked out before his parole officer could find him there (R.81:119).
- h. Defendant was arrested in Salt Lake City over two months after he told Robbie Rhodes that he was leaving and not coming back (R.81:120).

Defendant has therefore failed to meet his burden on appeal to marshal the evidence in favor of the verdict. "In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every

scrap of competent evidence introduced at trial which supports the very findings the appellant resists." *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah App. 1991). Because defendant has failed to meet this burden, the Court should decline to consider his argument. *State v. Pilling*, 875 P.2d 604, 607-08 (Utah App. 1994) ("it is inappropriate for us to entertain the merits of defendant's argument on this issue because he 'has not marshaled the evidence supporting his conviction, much less demonstrated why this evidence is so inconclusive that a reasonable jury could not have convicted him.'"), quoting *State v. Scheel*, 823 P.2d 470, 472 (Utah App.1991).

Even if defendant had properly marshaled the evidence, his claim would fail because that evidence could hardly be more compelling. Defendant told others that he intended to leave his residence without returning. Defendant took some of his property with him from the apartment and made arrangements for the rest to be packed up and moved out. Defendant never, in fact, returned to the apartment.

Defendant faults the State for failing to present additional evidence regarding issues not relevant to the absconding charge. Brief of Appellant, p. 8. Defendant asserts that the State failed to present evidence regarding his rental arrangements for the apartment. However, a claim that defendant moved out of the apartment does not require evidence that defendant's lease was violated or lapsed.<sup>2</sup>

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<sup>2</sup> This argument is also contradicted by defendant's assertion in his brief that he "was authorized to reside in one of the apartments at that address in exchange for his

Likewise, the State is not required to present evidence concerning defendant's unknown living arrangements during the two months after he abandoned his apartment. Defendant fails to make any argument why the State should be required to account for defendant's actions after he abandoned his residence in order to prove that he abandoned it. The charge of absconding does not require proof that, in changing his residence, the defendant actually rented a new apartment or had his mail forwarded to a new address. *See State v. Merila*, 966 P.2d 270, 272 (Utah App. 1998) (the word "change" in the absconding statute means "to make different: alter . . . to lay aside, abandon, or leave for another.") (quoting Webster's II New College Dictionary). Thus, the State only has to prove that defendant abandoned or moved out of his reported residence. The State does not need to present evidence that defendant made some formal arrangements for a new apartment.

Although defendant's brief ignores much of the evidence presented at trial, that evidence abundantly supports defendant's conviction on the charge of absconding.

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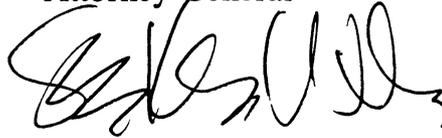
work for Mr. Hurtado [the owner of the building]" Appellant's Brief, p. 4. If defendant was living in the apartment in exchange for his remodeling work, he would have no basis for claiming an interest in the apartment after he stopped working there.

**CONCLUSION**

Based upon the foregoing, defendant's conviction should be affirmed.

RESPECTFULLY SUBMITTED this 5 day of April, 1999.

JAN GRAHAM  
Attorney General

A handwritten signature in black ink, appearing to read "S. K. Wilson", written over the printed name of Scott Keith Wilson.

SCOTT KEITH WILSON  
Assistant Attorney General

**CERTIFICATE OF SERVICE**

I hereby certify that two copies of the foregoing Brief of Appellee were mailed by first class mail this 5<sup>th</sup> day of April, 1999 to:

Randine Salerno  
Maurice Richards  
Public Defender Assoc., Inc. of Weber County  
2568 Washington Blvd., Suite 102  
Ogden, Utah 84401

A handwritten signature in black ink, appearing to read "M. Richards", is written over a horizontal line.