

1989

Michael R. Dulin v. Cook : Unknown

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

UTAH

DOCUMENT Michael R. Dulin - Preliminary Hearing

K F U July 10, 1984

50 Judge Gibson

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EXCLUSIONARY RULE INVOKED

DIRECT EXAMINATION - 19°

Q. Please state your name for the record?

A. My name is Jim Sifantonakis.

Q. Are you familiar with a business in Salt Lake County, State of Utah, known as the Omega Drive-In.

A. Yes, I am the owner.

Q. And its address, sir.

A. 3490 South State.

Q. There is a typographical error in the Information, Your honor, this says 3460. Here in Salt Lake County, State of Utah?

A. Yes.

Q. And you know an individual named Michael Robert Dulin?

A. Yes, he was one of my cooks.

Q. And was he a cook at this same address, 3490 South State?

A. Yes, he was.

Q. How long was he in your employment?

A. About 6 months.

Q. If you were to see him again could you recognize him?

A. Yes.

Q. Is he in the courtroom today?

A. Thats him right over there.

Q. Would you identify him for the reocrd, please, where he is sitting and how he is dressed.

A. He's got on a tan shirt, sandals, white socks, curly hair.

(Identified)

Q. Thank you, Your Honor. Would you describe for court and counsel what the Omega Drivein is structurally like as at 3490 South State.

A. Like, ah, what?

Q. A dñive in restuaraunt?

A. Yes it is a fast food restruant.

Q. And you indicated that Mr. Dulin was a cook?

A. Yes.

EXHIBIT "A"

Q. I direct your attention to May 21st, of 1984, was he on duty that day?

A. Yes he was.

Q. What shift did he work?

A. The morning shift. He came around 10 o'clock, or 9:00 and he goes home around 3:00 after the preparation is done.

Q. Three in the afternoon?

A. Yes.

Q. When is he next scheduled to work?

A. The next day.

Q. Would that be May 22nd?

A. Yes.

Q. With respect to the Omega Drivein and specifically May 21st, 1984, did you have a firearm inside the building?

A. Yes we did.

Q. Where was it kept?

A. In the back underneath the desk in the file cabinet.

Q. Is this desk and filing cabinet an open area inside the Omega Drivein?

A. Yeah, it is part of the back room.

Q. Ah, did you even observe that Mr. Dulin was exposed to this particular area in the course of his duties?

A. Well, he was, he was doing all the preparation in that back room so everybody is.

Q. With respect to the filing cabinet on May 21st was it locked, sir?

A. We never lock it.

Q. With respect to May 21st, 1984 did you occasion to personally see this firearm that you had?

A. Yes, that same night I was over there and me and my cooks, they got it _____ and they ^(shot) opened some holes in that wall.

Q. They did what?

A. They opened holes in my wall down there.

Q. _____

A. Yeah.

Q. Was Mr. Dulin present when this occurred?

A. No.

Q. What time did this occur?

A. That occurred around 9:00 o'clock at night.

Q. I'm going to show you a package that has been _____ will ask you if you will please look at the contents of this package.

Do you recognize the firearm, sir?

A. Yes, I do.

Q. Have you had occasion to see it before today?

A. Not today.

Q. What _____ that you recognize it?

A. Well, that's a gun that's _____ to me before.

Q. Is that the gun that was in your restaurant on May 21st, 1984?

A. Yes it was.

Q. Had Mr. Dulin ever seen that firearm inside your business to your personal knowledge?

A. I don't know if we had it out at lunch time or not but

Q. When say lunchtime, what do _____

A. Well, I means until 5:00 you know during the day shift, I don't know if we had it out or not. I can't recall it but we usually, you know, its not nothing secret.

Q. It is knowledgeable among your employees that you have a _____

A. They all knew, yeah.

(Objection-overruled)

Q. With respect to the gun how long had it been inside your business at the Omega Drivin prior to May 21st, 1984.

A. Its over a year.

Q. Did you authorize anyone to remove that firearm?

A. No.

Q. Did you authorize, what time does your business close?

A. 11 and they usually out by 11:30.

Q. Did you authorize anyone to enter your business after closing hours before opening hours on May 21st, 1984?

A. No

Q. Did you authorize anyone to so enter and remove a firearm?

A. No.

Q. Did you specifically authorize Mr. Dulin to enter the business after closing hours and remove the firearm.

A. Nope, no, nobody goes in there.

CROSS-EXAMINATION 25°

Q. Sir, this room this back room where you have the firearm, is that one big room next to the preparation room? Or is it or are they two separate rooms.

A. Its not really a desk its a bard between two walls and the file cabinet is under that next to the safe.

Q. And now is that in the same room-

A. Yes it is.

Q. Okay. So one room?

A. Yes, the whole thing is one room in the back.

Q. Now you testified that there were a number of employees opening holes in your walls that day?

A. Yes.

Q. Who were they, who was present that you recall?

A. My little cousin, name is Jim Senflakis.

Q. Who else?

A. And George was cooking up front

Q. George who?

A. George Chirstofo, Steve, ne's back in the old country visiting this summer.

Q. And what is his last name?

A. Zevhos.

Q. Were there any other employees who were present?

A. We're the night shift, they're always there, the girls.

Q. Okay and who was that?

A. You got me on that one.

Q. Okay, how many?

A. There're two.

Q. And as far as you can recall Mr. Dulin was not present _____

A. No he wasn't, he left around three, four o'clock.

Q. Now did you discuss this gun often with _____ employees.

A. Well, me and my cousins and my cook would talk about it but thats it, mostly in Greek.

Q. Okay, so you _____ to them in Greek?

A. Yeah. I don't want everybody to know.

Q. You don't want everybody to know about it?

A. But they did.

Q. Did you personally say anything to Mr. Dulin about the gun being in the back room or _____ where it was?

A. No, I haven't.

Q. Do you recall the officer that you reported this incident to?

A. The name

Q. Uh-huh.

A. No, it was a lady. And then another guy came in.

Q. Did you recall ~~what police~~ it was?

A. It was suppose to/the sheriff's department?

Q. The sheriff's department?

A. Yeah.

Q. Did you ever talk to anyone else in the West Valley City Police Dept. about this case?

A. No.

Q. Did you talk to anyone about this case other than the day you reported it, in other words did an officer come over to you afterwards and ask you anything after the day you reported it?

A. After I reported that ~~is~~ was burglary?

Q. Uh-huh.

A. No, they haven't. See the way, I found out that, the same morning that I went back to work Mike wasn't to work and I asked around what happened to him and one of the girls said that he was arrested with a gun.

Q. Okay, now did you give that information to the police?

A. Ah, to the detectives.

Q. Okay, so did you call that morning and tell the detectives?

A. Yes. To find out if it ~~was~~ the same gun that I have already lost.

Q. And did you later identify that gun?

A. A couple of weeks ago, they ~~were~~ here again, I guess they had to postpone it.

Q. But you did identify it?

A. Yes.

Q. Were asked before that time if it was the same gun, I mean, did they ask you before you came to court the type of gun it was.

A. Well, they asked me for the serial number and I gave it to them and I asked him if it matched and they didn't say nothing.

Q. This was on the 22nd day of May that you told the detectives of the Sheriff's dept. that you believed that Mike Dulin might have that same gun?

A. Yes.

RE-DIRECT

Q. When do you recall first personally talking to a police officer regarding the case, the very first time?

A. He was there the night they broke in, we called the sheriff dept. and then the next morning I found out that Mike wasn't to work and in the afternoon I called, or the morning I called and the detective department I talked to _____ may be the same guy.

Q. So when you say the night of the burglary did you go down to your business when the burglary was _____

A. Yeah, George Call me and I went down there.

Q. That's all.

DIRECT EXAMINATION - 304

Q. State your name for the record, please?

A. George Chrysscohos.

Q. Would you spell your last name?

A. C-h-r-y-s-s-o-c-h-o-s

Q. And you work at the Omega Drive in

A. Yes.

Q. And who was your employer?

A. Jim Sifantonakis.

Q. And are you familiar with the address of your drive in?

A. 3490 State

Q. Do you know a Michael Dulin?

A. Yes.

Q. If you were to see him could you recognize him?

A. Yes.

Q. Is he in the courtroom today?

A. Yes.

Q. Would you please identify him by how he is dressed and by where he is sitting?

A. He is sitting in front of me, ah, brown, tan clothes.

Q. May the record reflect...

Q. Directing your attention to May 21st, 1984, where you on duty that day?

A. Yes.

Q. What time did you start work?

A. 3:00 o'clock in the afternoon

Q. When you arrived was Mr. Dulin at the restaurant?

A. I can't recall.

Q. How late did you work?

A. Until 11:30

Q. Who closed the restaurant?

A. I did.

Q. Between the time that you arrived and closed the restaurant do you recall seeing Mr. Dulin inside the restaurant?

A. I do not recall, no.

Q. Was he in the restaurant during that time period?

A. No.

Q. When you closed, who was with you?

A. Ah, I was by myself.

Q. When you closed did you authorize anyone to enter the business after you closed it to remove any items?

A. No.

Q. Did you have a phone call or conversation with Mr. Dulin after you had closed, authorizing him to enter the business and remove any items?

A. No.

Q. ~~From the time you closed the restaurant until 11:30 p.m. on May 21st, 1984, did you close, sir?~~ Did you close, sir, on the 21st?

A. Yes.

Q. And what time would that be?

A. 11:30.

Q. Did you return to the restaurant?

A. Yes.

Q. At what time?

A. I was there at 12:30.

Q. Just an hour later?

A. Yes.

Q. Why did you return?

A. I took my wife to have a cup of coffee at the nearby Village Inn and on the way back she wanted to use the toilet.

Q. When you returned to the restaurant did you personally go inside?

A. Yes.

Q. What did you notice about the condition of the restaurant when you arrived?

A. That the front door was broken, glass was all over the place then I walked back and I saw the holder of the gun on, in front of the desk, and ah, all the drawers of the desk were open.

Q. Do you recall looking at the safe?

A. No.

Q. Do you recall looking side the drawers to the cash register?

A. Yes.

Q. What did you observe about that?

A. Ah, that, ah, most of it was in order except a few things were missing, I think there were quarters missing.

Q. Where were the quarters at the time you closed?

A. Inside the register.

Q. What else do you recall about the interior of the business?

A. I think the glass door was broken by a rock which was inside the restaurant, thats about it.

Q. With respect to the holster that you saw, where was that located specifically.

A. Ah, in front of the desk of the _____ that we have.

Q. Were you familiar with that holster?

A. Yes

Q. Had you seen it before ?

A. Yes.

Q. Did you know where it was located prior to your closing the business?

A. Yes

Q. Where was that?

A. Inside the desk.

Q. And was there anything inside the holster at the time?

A. The gun.

Q. Did you make any phone calls to law enforcement officers?

A. After the incident?

Q. While you were still there at that point?

A. Yes.

Q. Did they arrive?

A. Yes.

Q. Approximately what time?

A. 1:00 o'clock.

Q. Did you supply that officer with any information?

A. Yes.

Q. What did you tell him concerning the holster and firearm?

A. That it was dropped to the floor and that the firearm was taken.

Q. Had you seen it earlier that day?

A. Yes.

Q. What were the circumstances surrounding your seeing the firearm?

A. The same night, on the 21st?

Q. Yes.

A. Ah, a friend of mine and Jim Sifantonakis, the owner of the restaurant, were around the time, around 9:00 o'clock I think.

Q. I will show you what is in front of you, marked State's proposed exhibit, 1, will you please look closely at that item?

(Remove it from the plastic bag.) Do you recognize that _____?

What is that?

A. Is a 38, or a 380 special.

Q. Have you seen that before?

A. Yes.

Q. And where was that?

A. In the restaurant.

Q. Is that the same firearm that you've made reference to in your testimony today?

A. Yes sir.

Q. Thats all.

CROSS-EXAMINATION - 30°

Q. Sir, I'm sorry I could not determine if whether or not if anything was taken other than firearm?

A. Ah, later on when the policemant asked Mr. Sifantonakis-

Q. No, I'm asking what you know, could you tell if anything was gone out of the _____

A. No, no.

Q. Do you recall the officer that you talked to when you called the officers at 1:00 o'clock in the morning.

A. No.

Q. Thats all.

RE-DIRECT EXAMINATION - 30° (recalled Mr. Sifantonakis)

Q. In addition to the firearm that you previously, excuse me, would you identify yourself for the record?

A. Jim Sifantonakis.

Q. In addition to the firearm that you have already testified to, did you discover any other property missing from inside-

A. There was a pellet gun.

Q. Any other property sir?

A. Beside the pellet gun? I don't recall.

Q. Do you recall if any money was missing from inside

A. Quarters from the file cabinet.

Q. Any other money or currency?

A. Well, the saife is locked so they couldn't get to the safe.

Q. Did you notice the condition of the safe?

A. Ah, the carpet was removed from it and the lid was open.

Q. When you say the lid-

A. It has a steel lid over the combination that it pulls out but its locked so if you remove the lid and then _____ the combination, the whole _____

Q. What was the condition of the lid?

A. It wasn't on, where it was suppose to be

Q. All right and where was it?

A. Next to it, around the area, I can't remember exactly where it was at.

Q. And with respect to the carpeting would you describe that?

A. That was removed.

Q. Is the safe in the floor?

A. In the cement, yes.

Q. Where was this carpeting?

A. They have the carpet so it goes over the area so it doesn't show up and it lifts up and you take the steel lid off and the whole lid to the safe comes off.

RE-CROSS - 30°

Q. Was there anything taken from the cash register

A. There, probably quarters taken because the register came up a hundred dollars short that night.

Q. Okay, now you said there were quarters taken from the file cabinet?

A. Yes.

Q. When they were taken from both places?

A. Yes.

Q. So your talking about a hundred dollars worth of quarters from the cash register?

A. No, we don't keep that many in there, there were probably 15 in the file cabinet and about another 15 in the cash register. We don't put the change in the safe.

Q. So you're talking about a hundred dollars in quarters?

A. Uh-huh.

Q. That's all.

(Side 2 of Tape #5SL7828)

DIRECT EXAMINATION - 0°

Q. State your name for the record please?

A. John Richard Calder, Dick Calder is what they call me.

Q. Spell your last name?

A. C-a-l-d-e-r.

Q. Are you familiar with the business known as the Hole-in-the-Wall saloon?

A. Yeah, it was formerly Hole-in-the-Wall, we call it Old Hotel Saloon now.

Q. With respect to May 21st, 1984, what was the name of it then?

A. Old Hotel Saloon.

Q. And its address for the record?

A. 380 South State Street in Salt Lake.

Q. Were you there on the evening of May 21st, 1984?

A. Yes I was

Q. How long did you stay there.

A. Until about 4:00 a.m. the next morning, we close at 2:00 and I was there another hour or two.

Q. While you were in the business that evening did you have occasion, or morning, did you have occasion to see a firearm from a patron?

A. Yes I did.

Q. Approximately what time, sir

A. Very close to closing time, I would say 20 minutes, 15 minutes before 2:00 a.m.^{of}the next morning

Q. Where were you when you observed the firearm?

A. Well, I was invited to leave to front area and go to the back which is where our pool table, its actually opens on Fourth South, its a game room.

Q. Who was present when you observed the firearm?

A. Well, there were five or six people of which-

Q. Do you know any of them by name?

A. which I only knew one, the first name of one fellow who has been in our neighborhood there for several years, his name was Ben, the other people were unknown to me, another one was a constant patron of the bar there and then theres the fellow who is sitting here in the courtroom today.

Q. And who do you recognize in the courtroom today as one of the individuals that was in this backroom of your lounge-

A. The fellow at the table here.

Q. Will you identify him by-

(Judge: Will you point to him, sir?)

Q. Describe your circumstances surrounding your observing the firearm

A. Well, a hotel guest who was-

Q. Just when you saw it?

A. Oh, just when I saw it?

Q. Yes sir.

A. Okay, they just, someone presented it and it was aimed at my mid-section and there were several drunk people, the fellow present here today was offering to sell it to me

Q. Is that individual present, you mean the fellow that you just identified?

A. Yeah.

Q. Do you recall what he said to you regarding selling the firearm?

A. He said, do you want to buy a piece, he said, its a good one its worth a lot of money, its a real good one and the time when he pointed it at me, why I didn't like that very much but I wanted I asked to see it and I took it in my hand and then I removed the cartridge from the chamber, I clicked the clip so it fell down a notch then I pulled the bolt so the chamber was cleared. And then there was a little excitement when I did that whether they thought I was dangerous and going to shoot it or whether they wanted it back, I don't know, so then I flipped the pistol onto the pool table out of my hand and said that this was, I made some sarcastic remarks about drunks handling pistols improperly and someone grabbed it and which at that point I didn't watch closely who grabbed because I heard the shell go back into the chamber and I just decided this was time for me to walk away.

Q. You've indicated that he pointed it at me, when you use the word he, who are you describing pointing the gun at you?

A. The defendant.,

Q. Did you observe how he was holding it?

A. Well, he was holding it, I didn't presume that he intended to fire it on me if that's what you mean

Q. _____

A. He was just holding it as, ah, with his right hand and similar to as if he were to shoot it but it was just held in his hand like this.

Q. Did you see from where he retrieved the gun prior to his pointing it at you?

A. Not clearly, he, I think he had it in his belt or pants section under his shirt.

Q. Do you remember a cab appearing at 2:00 o'clock?

A. No I walked, left that area and the fellows followed me and we discussed as we went back towards the front of the bar, the price on the pistol.

Q. _____ when you discussed the price?

A. There were five or six people which I didn't know any one, just one had been registered in the hotel kept saying, buy this gun, and I kept offering something like thirty-five or fifty dollars varying between there and they said sevent-five dollars and about then we got to the front of the bar and the bartender said you're cab is here and a fellow entered who represented himself as a taxi driver came in through the front door and there was a brief discussion, we were anxious to have everybody leave, it was closing time and there was a little confusion about people trying to stay but they quite quickly left with the cab driver.

Q. Did you see if the defendant left at that time?

A. Yeah, he left at the same time with the cab driver.

Q. Did you see where the gun was at that time?

A. Back, I saw it go into his pants section, I mean, into like a belt section but I don't know if thats where he carried it, I just saw him put it there once.

Q. When you say he you mean the defendant?

A. Yes, uh-huh.

Q. I'll show you what has been marked as State's/^{proposed}Exhibit 1, would you please carefully at this item?. . . . Do you recognize it?

A. Its either the pistol that we are discussing or one identical to it.

Q. Nothing further, Your honor.

CROSS-EXAMINATION - 5°

Q. You said something about someone registered in the hotel, _____ the gun?

A. Yes, uh-huh.

Q. Okay did they have the gun with them when they were encouraging you to buy the gun.

A. No, they didn't.

Q. But they were encouraging you to buy the gun?

A. He told me that it was another person that he would introduce me to and I asked to see it and then he said well, you've have to go back here and-

Q. We're still talking ab-ut the person who is registered in the hotel?

A. Yeah.

Q. Okay now when did the conversation that you are relating right now take place, prior to seeing the gun or after seeing the gun?

A. Prior to seeing the gun.

Q. Okay, someone came up to you and said, buy this gun?

A. Well, he didn't say buy this gun. He said do you buy pistols and-

Q. Did you ever determine the name of that person since they were registered in the hotel?

A. No, I didn't.

Q. And then what did that person say?

A. Well, he said do you buy pistols and there were a number of statements which were all in the same direction saying you should buy this pistol, its a nice one

Q. Who made the statements?

A. Now when I'm saying, you should buy this pistol, no, excuse me, he didn't say in those words buy this pistol, you should buy the particular pistol that he was talking about

Q. And it was someone other than Mr. Dulin who was telling you to buy this pistol?

A. Yeah.

Q. Okay, where is Mr. Dulin at the time this person registered at the hotel was trying to tell you to buy this pistol.

A. During the initial conversations, I don't know where he was.

Q. And who was present besides the person registered at the hotel?

A. This guy named Ben, there were about four or five guys who I know as quote Neo-Nazis, they're radicals, they're a little strange and I know them

Q. At the table or

A. No I was at the bar and they were behind me, they were standing facing the bar.

Q. And then did someone lead you to the back?

A. And then I asked where the pistol was, he pointed at a group of maybe three individuals

Q. Who was in that group of 3 individuals?

A. The defendant

Q. And two other people?

A. Yes.

Q. Okay, and what were they doing when, they were first pointed out to you?

A. They were just standing there being a little rowdy, talking

Q. Drinking?

A. Yeah.

Q. And after they were pointed out to you what did you do?

A. Then I asked, said well, let me see it, and then they and it seems like half of the bar that were present, most of the people that were still there all proceeded in several little clusters toward the back area of the bar

Q. About how many people were there, I know this is going to be rough, but how many people were there?

A. I would say that by the time we got to the back of the bar there were five or six.

Q. And you say that's about who was left in the bar?

A. And, now there were about 12 people left in the bar, everyone started moving that way, by the time we were back by the pool table five or six is what the group constituted.

Q. Now when you reached that back room, what did you say?

A. I said well, where is it, or something like that.

Q. And who presented the gun?

A. to the best of my knowledge it was the defendant.

Q. To the best of my knowledge, are you saying the possibility it might have been one ~~xxxxxx~~ of the other two witnesses?

A. No, I don't think so

Q. What did you mean by the best of my knowledge?

A. Well, to the best of my knowledge, this pistol is the one that was shown to me it looks identically, it looks just like-

Q. Okay, that's what I wanted to know. All right, so you're saying then that the defendant presented you with a pistol.

A. Yeah.

Q. And thats when he offered to sell it to you? Did anybody else, when he made the offer did anybody else say anything to you, the two individuals that were standng with him?

A. There were drunken statements like buy it and leave it alone and don't take it, all kinds of little comments but as far as any direct conversation with anyone else in that particular moment, at the moment that it was aimed at my midsection no one said anythting intelligible

Q. What about Mr. Dulin, did he appear to be drunk as well?

A. My opinion that there was not a one of the group that I wanted to be there very long with, they were disorderly, whather they were drunk or drugged I couldn't say, they were unpleasant.

Q. Okay, and they had been drinking-

A. Oh, yeah, they had been drinking, they were behaving as people do at 2:00 o'clock closing time after an evening of drinking.

Q. Okay, let me ask you something else, had you been drinking?

A. Yes.

Q. What had you had to drkin?

A. Beer, draft beer.

Q. How much?

A. Over an 8 hour period probably 12 glasses. 12 10oz. glasses. Thats about what I drink during the shift.

Q. Now, youre testimony then is that you saw Mr. Dulin take the gun out of his pants?

A. Now I saw that once or twice, I'm not saying thats where he carried it because I don't think that is where he carried it, I didn't see it onhim

Q. _____

A. The gun was handed around two or three times there by the pooltable and it

Q. And you observed that?

A. I observed, just, yeah.

Q. Prior to your approaching him on the sale of the gun or afterwards?

A. I don't believe he recovered it from the pool table, there were different people were grabbing, I was turning my back but someone else took a hold of it and

Q. Did you see this?

A. Peripheral vision, I observed because he was still pretty much in front of me and it was someone else that was over by the pool table, yeah.

Q. Now you walked away, you observed other people taking it, did you actually see him take it again and put it in his pants.

A. I didn't see it delivered to his possession, when he got back to the front area of bar he

Q. You didn't see go-

A. I didn't see it go to his possession no.

Q. But when you got to the front area of the bar-

A. Then he had it again, yeah

Q. And where did you see it there.

A. _____ in his hand, with his hands up at his belt line

Q. Did you watch him walk out the door?

A. Yes.

Q. And did you see him enter any vehicle?

A. I didn't see him enter the taxicab

Q. Did you say anything to the cab driver or anyone else about that gun?

A. Not to the particular cab driver, I did say things to other people in the bar, yes.

Q. Okay, you didn't say anything to the cab driver?

A. No, huh-uh.

Q. Did you call the police after he left?

A. No.

DIRECT EXAMINATION - 10°

Q. State your name.

A. Richard Mellott

Q. Spell your last name?

A. M-e-l-l-o-t-t

Q. Your occupation?

A. Taxi driver.

Q. For what cab company?

A. City cab Company.

Q. Were are you employed out of?

A. 477 N. 200 West, here in Salt Lake.

Q. I direct your attention to the early morning hours of May 22nd, 1984, where you on duty that morning?

A. Yes, I was.

Q. Did you have an occasion to pick up a fair in which you later observed a firearm?

A. I didn't even have to wait until later, he dropped it as he was getting in the car.

Q. And approximately what time in the morning?

A. It was about 2:00 in the morning.

Q. Were you specifically picking up this fair?

A. The Old Hotel Saloon about 380 S. State in Salt Lake

Q. And did this person get in your cab?

A. Yes.

Q. If you were to see this person again, could you recognize him/

A. Yes.

Q. Is he in the courtroom?

A. Yes, he is sitting over there.

Q. How is he dressed?

A. How was he dressed?

Q. No, how is he dressed?

A. He's in a tan shirt and sandals.

(The record reflects identification of defendant)

Q. Direct your attention to his getting in the cab and the firearm being dropped, will you please explain that?

A. Actually it goes back further then that, when I went into the bar to get him and he and the owner of the bar were having a conversation, appraently dickering over something that was not in evidence and I was curious about what that was cause the price was 60, or 70 or 80, or 90 then I identified him as a fare, or he was idenetified to me, he said go ahead and hang out so I went outside and waited for him in the car and he came out of the bar and as he was getting into the car he seemed to be drunk, he dropped something on the ground, I looked and it was a pistol.

Q. What occurred then?

A. Ah, he picked it up, got in the car, sat down and then a,a,

we sat there for a minute-.

Q. What occurred then?

A. We sat that for a minute, well, for several minutes while he talked to a friend of his, at least it seemed like a friend who borrowed some money off from him, ah, and while he was talking to that guy, another person came around to my side, and mentioned that he had gun and I said I know, I saw it already. And

Q. What occurred Then?

A. Then he, the man who was talking to me said I should call the cops or drag my feet as I went through town, try and get pulled over.

Q. What did you do?

A. Ah, I just said, well, I'll handle it.

Q. Did you call the police?

A. No I didn't.

Q. Did you call your dispatcher?

A. Only to report in where I was going.

Q. Where did you tell your dispatcher where you were going?

A. That I was going approximately 2700 W. and 3500 South.

Q. Did you indicate anything to them about a gun?

A. No I didn't.

Q. How long did you stay in front of the saloon

A. I would guess approximately 5 minutes.

Q. What occurred then?

A. Then we left, I dragged my feet as I was going through town, I didn't know-

Q. How many individuals were inside your car?

A. Just him. And he was-

Q. Where was he sitting?

A. He was in the passenger's side front.

Q. As you were driving did you have any conversation with the defendant?

A. Yes I did.

Q. Can you relate that?

A. Well, I proceeded to be friendly with him and I said you guys were talking about a gun and there were _____ and he said yeah, he was kind of out of it, and I said maybe I would be interested let me take a look at it, so he pulled it out and took a round out

of the chamber and ah, took the clip out, put the round in the clip and then gave it to me and I looked at it, noticed it, it only had one bullet in the clip, there wasn't another one and I took the bullet out of the clip and looked at it and put it back and while we were doing this the dispatcheer called me^{again} and asked me where I was going, he doesn't usually do that so I assumed that the cops had been called-

(Objection-sustained)

Q. What occurred after the dispatcher called you? Did you make a statement to the dispatcher?

A. Yes, I gave him my destination again which was just a intersection number, I hadn't really been given an address. And, ah,

Q. Did you continue to drive to that location?

A. Yeah, we got on the freeway on 5th South and went out the freeway.

Q. What occurred while you were on the freeway?

A. I looked at the gun, I handled it and then I gave it back to him and he put the clip back in the gun without chambering a round, the round

Q. What happened then?

A. Kept it on the seat between us and I said, you know, there was somebody back there at the bar who said that I should call the cops or somebody should call the cops so I said, you know, are you hot or something, I said if you're hot just relax I'm not going to ~~get~~ involved I just want to be safe myself.

Q. Did he say anything to you?

A. Not really, he just said I wasn't hot and that the gun wasn't hot and he was just trying to sell it.

Q. Were you ultimately pulled over?

a. Yes.

Q. Did you have any more conversation with him other than you've related prior to your pull over?

A. Well, I said, so the cops may have been called and ah, he asked me a couple of questions, he asked me what ~~xxxxxxx~~ would it cost to go to Wendover, Nevada and I approximated that for him and as we got to the intersection that he had stated, as I turned it I noticed the police with lights on behind and saw the other pull up to an intersection just about half a block ahead of me and I said, well, the cops are here. And he laid the gun on the floor

under my feet and he said, well, this is your gun now, and I said Just be cool and we'll handle it, and I pulled over and I got out of the car and exited back to the police vehicle and I told them that he hadn't been belligerent or made any hostile moves and the gun was on the front floor.

Q. What occurred then?

A. Then I stayed back by the police vehicle while the officer went up and picked up the gun and brought it back and another officer got Mr. Dulin out of the car and put him against the trunk and investigated.

Q. I will show you what has been marked as State's proposed Exh. 1 will you please (rattle of paper). Do you recognize it?

A. Yes I do.

Q. What is that?

A. That's a 9 mm short German manufactured pistol.

Q. With respect to, what I am asking you, sir, is with respect to the morning of May 22, 1984 (rattle of paper) firearm

A. Yes I do.

Q. And what is that with relationship to that morning.

A. This is the gun that he had on _____

Q. That's all.

CROSS-EXAMINATION - 17*

Q. You said that Mr. Dulin was pretty, what you said was he was kind of out of it, what do you mean by that?

A. It was apparent to me that he had been drinking.

Q. Would you say he was pretty drunk?

A. Yeah.

Q. Now this happened early morning hours of May 22nd is that right?

A. Uh-huh.

Q. Did you talk to any police officers that evening regarding this?

A. Ahm, no I didn't, not really, at the site I did-

Q. Where were those police officers from?

A. They were from West Valley.

Q. Do you remember the name?

A. No I don't.

Q. Did you later have an officer contact you from the Sheriff's Department.

A. From the Sheriff's Department?

Q: Uh huh. Approximately three days later.

A. Yes. I don't remember his name. It was about a case in West Valley.

Q. Was that about this case?

A. No, I don't believe it was.

Q. Did officer...Do you recall the day?

A. Do I recall the day...^{Q.}the day that the officer contacted you.

A. Not specifically, no.

Q. Do you recall anyone from any department asking you a few days later again about what had happened with respect to the gun?

A. How do you mean in respect to the gun.

Q. Did they ask you about where it came from or what happened again after the incident occurred? Do you recall.

A. I remember one officer, no name, asking me about it and then mentioning that it had been involved in a burglary.

Q. Okay, when was that. Was that at the scene or a few days later.

A. I also remember one of the West Valley Policemen mentioning that they had been looking for Mr. Dulin in connection to the burglary.

Q. Okay, let us get back to that day. Now the officer told you this is after the scene, is that right?

A. Yes, I believe it was a few days later.

Q. The officer mentioned to you that the gun had been involved in a burglary.

A. Yes.

Q. Okay, and you recall what department that officer was from.

A. Um, I still think it was West Valley.

Q. You are not sure but that is what you recall?

A. I think so.

Q. Thank you, that is all.

DIRECT EXAMINATION 19*

Q. State your name for the record/

A. John C. Chilton.

Q. Your occupation.

A. I am a police officer for the city of West Valley.

Q. How long have you been so employed?

A. About three years with West Valley.

Q. I direct your attention to the morning of May 22, 1984, were you on duty?

A. Yes I was.

Q. What shift were you working?

A. The graveyard shift.

Q. What is that.

A. That is from eleven at night until seven in the morning.

Q. Did you have occasion to stop a cab that morning on May 22, 1984?

A: Yes sir, I did.

Q. What time did you actually stop it?

A. I made the actual stop on the cab around 2:17 in the morning.

Q. What was the location?

A. 3200 West 3500 South.

Q. What was the city, within the incorporated limits?

A. West Valley.

Q. At the time of the stop, did you observe the number of individuals inside the cab?

A. Yes sir, there were two.

Q. Who were they do you know

A: Uh one was the driver of the cab and the other one is, was identified as Mr. Dullin

Q: With respect to the driver of the cab did you have a conversation with him

A: Yes I did

Q: Where did that take place

A: My initial conversation with him was at the rear of my patrol vehicle after I made the stop

Q: Did you then have occasion to conduct an investigation inside the cab itself

A: Yes I did

Q: Relate that to the court please

A: As soon as I talked to the cab driver he informed me that the passenger no longer had the gun that it was laying immediately on the floor board in front of his seat, or the driver's seat, that's where he had placed it and I walked up to the car with my cover officer and took possession of the weapon

Q: Was there an individual inside the vehicle

A: Yes

Q: Is he in the courtroom today

A: Yes he is

Q: Can you identify him for the record

A: He is sitting at the defense table in khakis, brown hair and moustache

Q: May the record identify the defendant

JUDGE: It will

Q: Did you make an arrest

A: Yes, Officer Davis took the passenger into custody

Q: Under what charges

A: Ex Con with a gun, or restricted person with a firearm

Q: What did you do with the firearm

A: It was booked into evidence

Q: Did you remove it from evidence

A: Yes I did this morning

Q: This morning, I will show you what has been marked as State's Exhibit I will you please (inaudible a lot of noise) and make identification

A: Yes this is the same weapon I booked in as evidence

Q: With respect to the envelope, there is also another item in there, do you recognize that

A: Yes

Q: What is that

A: It is a Department of Corrections identification card

Q: And where did you acquire that

A: From the, from Mr. Dullin that night

Q: With respect to the firearm did you have a discussion with Mr. Dullin concerning his possession of it

A: No I did not

Q: Did you file the restricted person case to the West Valley Office

A: That was part of the initial arrest, yes, but I didn't screen the case no

Q: Alright, do you know Detective Ron Edwards

A: Yes I do

Q: Is he with West Valley

A: Yes he is

Q: Were you involved in any way whatsoever with respect to a burglary and theft of a firearm occurring in Salt Lake County

A: No I was not

Q: Move for the admission of Exhibit I

JUDGE: Admitted

CROSS EXAMINATION

FP: Did you talk to anyone outside the West Valley City Office with respect to this case, any other law enforcement officer

A: No I didn't, uh, I was informed the first time this was supposed to go to prelim that this gun was involved in another case that the county had been investigating and to my knowledge that's the first I had heard of it

Q: O.k. so at the first, do you recall when that first setting for preliminary hearing was

A: A month ago, a month and a half ago, a month ago

O: Did it go to prelim on that particular day

A: No it did not, at least to my knowledge, I was released, it was going to be continued

O: O.k. that's all thank you

PROSECUTOR: Nothing further

JUDGE: Wait outside sir

DIRECT EXAMINATION

PROSECUTOR: State your name for the record sir

A: Dale Bullock

Q: Your occupation...

A: Deputy Sheriff Salt Lake County Sheriff's Office

Q: Were you so employed on May 22 and May 21, 1984

A: The 21st was a Friday, I believe I was

Q: Did you have occasion to become involved with some followup detectives in a burglary that occurred at the Omega Drive Inn at 3490 South State herein Salt Lake County State of Utah

A: Yes I did

Q: With respect to that case, were you asked to do some investigation, did you bring the case into screening in the Salt Lake County Attorney's Office

A: Yes I did

Q: On what day

A: on 5-25-84

O: What were you screening with the Salt Lake County Attorney's Office, what crimes

A: I started to screen a burglary, theft case

Q: Alright and who was your suspect

A: Michael Dullin

Q: Were you involved in any way with the screening and filing of a possession of a firearm by a restricted person

A: No I was not

Q: Were you out to do some further investigation on the case

A: Yes I was

Q: What were you asked to do

A: Specifically there were a couple of people I had to contact and take statements from and contact two different courts for papers

Q: For a habitual criminal

A: Yes

Q: I will show you a packet of documents marked State's Proposed Exhibit II, please take a moment and look at them, (shuffling noises) do you recognize those documents

A: Yes I do

Q: What are they

A: They are records from the court showing information, commitment, judgment and commitments on two separate cases

Q: On one individual and two separate cases

A: Yes

Q: Alright and who are they on

A: Uh, Michael Dullin

Q: Is he in the courtroom today

A: Yes

Q: Would you identify him for the record

A: The individual sitting at the table next to the lady in the dark dress

FP: Are these certified copies

PROSECUTOR: Yes

FP: Then I am not going to have any objections

PROSECUTOR: When did you next come into the county attorney's office next to screen your burglary, theft

A: That was on June 8th

Q: Was a complaint issued at that time

A: Yes

Q: Nothing further.

CROSS EXAMINATION

FP: June 8th is when you originally went in to, or June 8th is the date the complaint was issued

A: Uh that was the day the information was prepared for signing, June 8th

Q: You went into Mr. Soltis on the 25th of May regarding this case is that right

A: Yes

Q: O.k. and at that time uh, you were prepared to file charges at that time is that right

A: Yes

Q: O.k. but you did not file for that particular time for what reason

A: As I stated there were a couple of other contacts and statements that was necessary prior to filing

Q: O.k. and isn't it true that Mr. Soltis told you that he wanted to file a habitual criminal at that time, but he needed those papers

A: That's true also

Q: And then on the 25th you contacted a Richard Miller, the cab driver

A: Yes I did

Q: That's May 25th

A: Yes

Q: And at that time then you were aware that Mr. Dullin was arrested and in fact incarcerated for possession of that very firearm, is that right

A: I was aware that he was arrested and was in possession of it

Q: Alright, were you aware that he was incarcerated

A: Yes I don't know what charge

Q: Now you had to go to West Valley City evidence to look at the gun is that right

A: I did

Q: Did you ask them to release it to you

A: No, I did not

Q: O.k. why not

A: Uh, I just didn't, I viewed it, all I went out there for was specifically to compare the serial numbers and confirm that the numbers on the weapon were the numbers on the report so that

Q: At that time did you find out or ask or inquire as to whether or not West Valley was going to file anything on that, on him

A: I didn't speak to any officers in regard to the case that day

Q: Did you later speak to anyone with regard to the case and the gun

A: Somewhere along the line I talked to some officers concerning how it all come about, I did

Q: Are these officers from West Valley City

A: Yes

Q: Were you aware, did you have anything to do with the, you may not know this, I am going to strike that. Uh, Where did you serve the arrest warrant on Mr. Dullin

A: Salt Lake County Jail

Q: O.k. at that time did you look at his booking sheet to see what he was booked for

A: No

Q: O.k. were you aware of a preliminary hearing being held in West Valley City on the, involving that same gun

A: No

Q: O.k. when did you talk to the West Valley City Police Officers

A: I, sent in my report, I don't recall a specific date, I didn't uh obtain any information that I put into report form

Q: On 6-25-84 or excuse me on May 25th 1984 the date that you obtained these commitment papers that are before the court today is that correct

A: That's correct

Q: And it was not until the 4th of June that you filed a report uh regarding your obtaining this, is that right

A: The 25th was a Friday, I was on vacation the following week and that's, I would assume the 8th would be close to a Monday, but that

Q: Is that the date on the report wherein you indicate that this information with respect to the filing and the gun and

A: O.k. on June 8th of 84 is when I contacted Deputy County Attorney Soltis and

Q: My question was what was the date of your report, that you filed it

A: My report, well everything I do is

Q: The (inaudible everyone talking at once) the last report (inaudible) that you received the report, you received the commitment on 5-25-84

A: That's correct

Q: And you filed a report with respect to that, is that right

A: Well on 5-25-84

Q: O.k. and what is the date of that report, that print out report wherein that information is contained

A: I am sorry I don't understand your question

PROSECUTOR: (inaudible)

FP: Pardon

PROSECUTOR: Are you asking him what date he made the report

FP: Yes, thank you. What date did you make your report

A: O.k. when you say what date that I dictated it for typing

Q: Yes

A: Oh that's your question, o.k. that would be 6-1-84

Q: O.k. 6-1-84

A: Well no, it was 6-4-84 that that information was contained

Q: O.k. that's the date the report was prepared.

A: No, I am sorry again,

Q: O.k.

A: You are inquiring on the date of what, I have got three different reports and three different dates, I don't want to give you a wrong date

Q: The date wherein contained the 5-25-84 information

END OF TAPE SIDE B

FP: The date wherein contained the 5-25-84 information, that contained the commitment and judgment

A: O.k. that was dictated on 6-1-84

Q: O.k. and if that was the date then that your report was prepared

A: Yes

Q: Now, then your testimony is that on the 8th of June you then returned to Mr. Soltis with this information in hand, for the filing of the information

A: Yes

Q: Now when, the gun, when you have discovered the serial number on the gun was the same, let me ask you this, is this still in West Valley City evidence room, did you bring that gun here today

A: No I did not

Q: Once you obtained the serial number of the gun, what did you do with it

A: Merely compared it with the initial report and concern that that number on the gun was the same as the one reported on the initial report

Q: O.k. and where did you get that initial serial number

A: From the report, initial report submitted by Jim and I can't pronounce his last name

Q: I know who you mean, I can't pronounce his name either

A: Are you chicken

Q: No, no well let me ask you this, isn't true that Mr. Jim, the owner of Omega Cafe, did not know the serial number

A: At the moment on the report he didn't know, I apparently obtained that the following day then, you are right it is not included in the first, in the initial report

Q: And is it not true that that serial number came up on an MCI scoop

A: Yes off of that second report that he had filed

Q: O.k. now you testified that you had not talked to any police officers about this case but you did have to go to West Valley to get that gun, that gun has not been returned into your possession is that right

A: Right, yeah I didn't talk to anybody that day, yeah I spoke to, I don't recall who and I didn't document a date, I have spoke

to somebody out there but it was like I say, I didn't obtain any information that I put into report form

Q: O.k. Were you aware that subsequently the West Valley City Police Officers were going to file a case then against uh, Mr. Dullin on a restricted person, were you informed of that by them at any point

A: Not that I recall

Q: Did you, prior to coming here today did you know that he was being charged with a restricted person

A: Prior to today, yes

Q: Did you know about the first part of June, after the information was served

A: Uh, I don't believe that was brought to my attention until after the arrest warrant had been served

Q: Are you the only investigating officer in this case

A: For the Sheriff's office

Q: Yes

A: Yes

Q: And you remember what officer if any that you eventually did talk to from West Valley, their names

A: I just don't recall

Q: May I have a minute. You did prepare a police report in the matter

A: Yes

Q: And you brought it with you

A: Yes

Q: If I may look at it. That's all I have officer, thank you.

RE-DIRECT EXAMINATION

PROSECUTOR: I believe I need to clear the record on the one point, direct your attention to May 25th of 84 where you brought the case in and you screened it with me, do you recall my calling West Valley police to see if they had filed a restricted person charge against Mr. Dullin

A: I just can't specifically recall

Q: I will clarify it with a proffer your honor. That's all I have

JUDGE: Anything else you want to ask him.

FP: I have nothing further

JUDGE: Wait outside.

PROSECUTOR: I only have one more witness that I would like to call your honor that would be

JUDGE: Anything we can stipulate to, it seems like we

PROSECUTOR: Will you stipulate that he was on parole

FP: Yes

PROSECUTOR: State would rest your honor, I do have to proffer one point

JUDGE: The record will show that she stipulated that the defendant was on parole at the present time and at the time of the commission of the alleged offense.

PROSECUTOR: To clarify the record on the point that counsel was bringing out with Mr. Bullock, when he did bring it in on the 25th of May to screen it. while he was in the office with me. I did call West Valley and talk to Detective Ron Edwards that same morning on the 25th and he indicated that he had just filed a restricted person charge with Tom Vuyk at the West Valley Salt Lake County Attorney's Office. That should clarify it.

JUDGE: Do you rest then

PROSECUTOR: Yes your honor

FP: Your honor we would have nothing except of course my motion to dismiss which I would like to argue

JUDGE: Have you advised the defendant of his right to make a statement

FP: No I will do that. Mr. Dullin you have a right to make a statement at this time subject to cross examination by the prosecution, you also have a right to present witnesses on your own behalf, also subject to cross examination by the prosecution. My advise at this time is to make no statement and present no witnesses, do you wish to follow that advise.

A: Yes

JUDGE: Do you have a motion to make

FP: Yes your honor my motion

JUDGE: Uh, let me make one observation before we start the motion, it would appear to the court the direction of some of the questions that maybe somebody is going on some sort of ~~stoppel~~ stoppel theory, I don't know if that is appropriate in a single criminal episode statute, but that's what it seems like we are getting at here

isn't it

PROSECUTOR: I assume counsel's motion @ince we are at the Circuit Court level is procedural pursuant to the single criminal episode statute in our constitution

FP: That's correct

JUDGE: O.k. go ahead

FP: It is and your honor the reason we are going into this, I am not alleging anything constitutional, I think that what we have here is a single criminal episode, under §76-1-401 the statute where it is defined single criminal episode, the court is familiar with that, what it constitutes and what we are arguing here is that at 12:30 uh and a burglary was allegedly committed and in that burglary a firearm was taken an hour and a half later that firearm was attempted to be sold. While this is not the type of case where you have different victims, different robberies, I think it is unique, I think, uh, in the, I have a case where the court, State v. Kimball wherein the court outlined a general path to whether an offense, as to whether there are separate offenses or one offense. And what the state, what the case holds is that what is required here is one general intent, on page 518 the court determines that the general test as to whether they are separate offense or one offense is whether the evidence discloses more general intent or discloses separate distinct intent and in this particular case it involves a juvenile who is directed by the defendant to go to a place to pick up some thread protectors and take them someplace else and sell them, he did this a day apart, now they are arguing as if they were two separate misdemeanor offenses, the court held that they are but one felony theft because this was one general offense, one general ----- which included taking the items and selling them

JUDGE: Two different dates he did the same thing

FP: He did the same thing and that's one general plan to commit one offense, I argue we have the same thing here, we have the taking of breaking in to get the gun, to get something, the gun apparently is the argument they are making that he knew about the gun to sell and that all happened within the same amount of time, now they argue within this case that part of his selling the item, even on separate days in part of that general intent,

that one offense and that's what we have here, we have an hour and a half after, time lapse there from the time that the burglary allegedly occurred to the time that Mr. Dullin was discovered with the gun, so what we do have then is one single criminal episode and I was going to argue under §76-1-402(2) which provides that the defendant shall not be subject to separate trials for multiple offenses when they are within the jurisdiction of a single court and in this case through the county attorney's office they could have been and when they are known to the prosecuting attorney and Mr. Soltis has admitted that he knew they were going to file the restricted person, I think it is obvious from the conversations that they were aware the gun was being held by West Valley, they would have to know or they are acting in complete ignorance that something was going to be done with that otherwise it would be released to them for holding in evidence for this case, and Mr. Soltis, even if the officers did not appear, Mr. Soltis actually knew that they were going to file those charges. On May 25th the officer had the Information prepared to file on the habitual criminal, the burglary the theft and those individual matters, so I think at that juncture the state was required to on one information file all those matters or at least advise him that that is what has happened and I presented an affidavit with my motion to the court, Mr. Garcia has represented Mr. Dullin on the felony matter in West Valley City on an information filed by Tom Vuyk, on a firearm by a restricted person now at that point through plea negotiations he plead to a possession of a firearm by a restricted person which then puts him, well under jeopardy, he was as the statute requires under single criminal episode, I am not talking just ----- what I mean to say is that that this prosecution resulted in a conviction §46-1-403 where the statute provides that if a defendant has been prosecuted for one or more offenses the ----- of a single criminal episode and that separate prosecution will be barred if that prosecution resulted in a conviction and where he plead guilty and Mr. Garcia indicated that he did and was sentenced for a year on it and I believe that for the state to proceed on two different informations and they have all that information, to allow him when they could have filed, at that point filed those informations or at least advised him of

that, that is under one thing, I think that is unfair and prejudicial to the defendant although we don't have it here but I think it arises out of the same criminal episode and this prosecution should be barred.

JUDGE: Mr. Soltis

PROSECUTOR: Thank you your honor, with respect to the West Valley case, uh, in looking at Mr. Garcia's affidavit, it neglected to specify the charge to which he actually plead guilty to

FP: That's because I didn't have the record at the time because West Valley would not give that to me without a court order

PROSECUTOR: Well I am not accusing anybody

FP: O.k. but I will get that but (everyone talking at once) but I couldn't get those records from West Valley they wouldn't give them to me, I am sorry go ahead

JUDGE: So Mr. Soltis

PROSECUTOR: And so I went to the state's file and Mr. Christensen uh put down Class A and neglected to also indicate the crime that he plead guilty to so I went to the court's file and noticed that in the judgment it is possession of a dangerous weapon by a restricted person, a Class A and my reading of the statute would make that a legal impossibility, and so I ask the clerk, Judge Grant's clerk to please call up West Valley and get a copy of the tape in which the plea actually took place and determine what he actually plead guilty to. I believe the inside of the jacket indicates that he plead to possession of a dangerous weapon, Class A and judgment and commit said possession of a dangerous weapon by a restricted person and so I asked her to please examine the tape and prepare the amended judgment to conform with what he plead guilty to and she has filed an amended judgment and commitment, to my knowledge she has anyway, charging him with possession of a dangerous weapon, a Class A misdemeanor and I required a copy of the preliminary hearing tape, or the tape of the plea and its set on the particular section should the court want to play it for the benefit of counsel to that point, so what I am trying to do now is set the record straight as to what he actually plead guilty to and was sentenced under, the particular restricted person statute is under two controlling paragraphs, the first paragraph goes to a Class A or third degree felony should it be a firearm, the second paragraph addresses

itself to a person who is in custody and prison or on parole and that they have a dangerous weapon it is a third degree felony, if its a firearm, its a second degree felony, so the reduction to my best understanding of the record was to the first paragraph, possession of a dangerous weapon, a Class A misdemeanor, deleting (1) that he was on parole and (2) that it was a firearm. With respect to the single criminal episode the test is closeness in time and criminal object and the, is the court aware of the Ireland and Cornish cases your honor

JUDGE: I don't have that in front of me

PROSECUTOR: Alright, you are generally aware

JUDGE: Yes

PROSECUTOR: of those cases and it is our position that under the two point test of one closeness in time, we do not have closeness in time we have a separation in time from anywhere from one to two hours, we have a separation in location and clearly we have a separation in criminal objective, the crime of burglary and theft are complete upon entry with the intent, the included offense which would be part of the burglary a single criminal episode, theft is complete upon the taking with the intent to permanently deprive, that occurring in Salt Lake County, we then have a completed offense. The possession by the restricted person, a different address a different city and a different criminal objective, separate and apart from burglary and theft, a status offense, uh, dissimilar in objective and into of course the time and location of the first charges, not giving rise to the single criminal episode.

JUDGE: Ms. Palacios

FP: Your honor ----- the possession, in order for him to obtain or possess that item to commit the theft to take or obtain control, ones has to possess and it would not his parole status and not the firearm in and of itself that gave rise to this offense, but rather the possession and those two other factors, so we have, it is difficult to argue that his plan was to be a restricted person in possession of a firearm, but he knew he was restricted and he knew he was on parole and knew he had the prior commitment and that theft, part of that same kind of possession, has just by implication to occur that has to be part of the same general objective, you can't separate that, I don't think the difference

in the address makes that much difference because the court argued in the Kimball case that going and taking and then selling, if we were to argue that at the end of the theft, once it was taken and sold and that would be the end and that would be one misdemeanor theft, but then we have the next day again taking and taking it over to the person and selling to them, again they said that is one general objective and so for him to take and sell that and it was in that time close frame, still makes it one single criminal episode and for them to not charge that within one complete framework when they had the knowledge and could do that, then I think it is a violation of this statute which is termed for that purpose and it, as the court can see the result that comes from that, I mean there is no evidence that Mr. Dullin in fact he tells me he is not aware nor of course is Mr. Garcia allowed to concede this matter if they knew that everything was coming up, and so you have multiple prosecutions here on the same incident, once he plead there was an assumption that that case was terminated and remove the court to dismiss it on that basis.

PROSECUTOR: Your honor the question of overlapping facts is the possession our Utah Supreme Court dealt with that in the Cornish case. And that is not controlling as I read the case, what is controlling is the criminal objective for that crime, although the defendant may have a separate objective, escape for doing something else with the firearm, or the car and in Cornish it doesn't alter the legal analysis of the single criminal objective and the fact that there may be overlapping evidence in the two particular prosecutions.

FP: Your Honor I am not familiar with Cornish, I don't know if that is a lesser included offense type argument or what they are talking about there as far as possession of those elements, but I, not having received that case, I don't have an opportunity to distinguish that but, I don't think that in the gate of a general objective here that we are -----

JUDGE: It would appear to the court that the certain offense of this case would indicate that there are separate and distinct intents in this case and the motion to dismiss will be denied.

FP: Your honor for my information would you please state for my information what you determine those

FP: I am not questioning you, I am just asking for my own information.

JUDGE: O.k.

FP: How the court views that.

JUDGE: Its in the citation you gave me o.k.

FP: But applied to this case

JUDGE: Yes as it applies to this case yes mamm. Would you stand
please Mr. Dulling. BOUND OVER