

1999

# West Valley City v. James Weston Decker : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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WEST VALLEY CITY,	)	
	)	
Plaintiff-Appellee	)	
	)	
vs	)	Court of Appeals
	)	Docket No. 990029-CA
	)	
JAMES WESTON DECKER,	)	Priority 15
	)	
Defendant-Appellant	)	

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APPELLANT'S REPLY BRIEF

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APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY

The Honorable Ann Boyden, District Judge

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**FILED**  
Utah Court of Appeals

SEP - 7 1999

Julia D'Alesandro  
Clerk of the Court

IN THE UTAH COURT OF APPEALS

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WEST VALLEY CITY,	)	
	)	
Plaintiff-Appellee	)	<b>APPELLANT'S</b>
	)	<b>REPLY BRIEF</b>
vs	)	
	)	
JAMES WESTON DECKER,	)	Court of Appeals
	)	Case No. 990029-CA
Defendant-Appellant	)	

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<b>State vs McDonald,</b> 948 P.2d 371 (Utah Court of Appeals 1997) 6, 7, 11	

very deception practiced by the prosecutor has fooled and misled the Defendant, but the trial court as well!

It is for this purpose---namely, that a "bill of particulars" forces the prosecutor to focus in and precisely identify specific facts, etc., necessary to the successful charging and conviction of an alleged offense---that the bill of particulars was requested!

The prosecution, having filed such a VAGUE and proven-AMBIGUOUS information as was herein filed, cannot be rewarded for having misled the Defendant and, implicitly, misled the Court!

In this case, the Defendant's contention is NOT what he did. The Defendant knows exactly what he did. The request for the bill of particulars is significant because it forces the prosecution (1) to allege an offense AND (2) to prove that offense. That didn't happen here.

The incongruous result shown by Judge Boyden's verdict was certainly not anticipated; a better-pleaded Information (or the requested bill of particulars) would have had a different result!

The "abuse of discretion" standard for appellate review of the trial judge's decision (to deny the sought-for "bill of particulars") should be applied where the trial judge is in full possession of all of

the facts. Where, however, as in this case THE TRIAL JUDGE WAS NOT SO FULLY INFORMED, BUT WAS SIMILARLY A VICTIM OF THE PROSECUTOR'S FAILURE TO PRECISELY PLEAD THE ALLEGATIONS AGAINST THE DEFENDANT, the standard should be different.

The Appellant's Brief cites to **State vs Bell**, 770 P.2d 100 (Utah Supreme Court 1988), and **State vs Knight**, 734 P.2d 913, 919-21 (Utah 1987), holding that in cases such as this the burden should be "shifted" to the prosecutor to justify the prosecutor's actions. The Appellee's Brief is fatally lacking in any response to the requirements imposed by the holdings of **Bell** and **Knight**!

The Appellant has clearly shown the outcome of the case would have been different and that the appellate court's "confidence in the outcome has been eroded" and that a reversal of the conviction should be entered.

The prosecution HAS NOT shouldered or met the "burden shifting" requirement placed upon it!

The Court of Appeals should reverse the convictions, order the creation and service of a bill of particulars, and remand the case for a jury trial.

## II THE "JURY TRIAL" ISSUES

The problem with approaching the denial of the

"jury trial"---as demanded and AS SCHEDULED, per the trial court's own order---is not merely for "sentencing" (ala six months or less incarceration), but for the Defendant's "constitutional right" to have **a jury determine his guilt or innocence!** [This case is further exacerbated by the fact that had a jury been empaneled, the incongruous "verdicts" found by the trial court may not have happened at all, due to the more precise nature of the presentation of the prosecution's theory of the case---through jury instructions---and the Defendant's response thereto!]

Whether jail time is imposed (or available) is not necessarily the only issue when dealing with this most fundamental "constitutional right".

The undersigned believes that the decision of the Court of Appeals in **West Valley City vs McDonald**, 948 P.2d 371 (Utah Court of Appeals 1997), is misplaced, jurisprudentially, in this case, for the following reason: **McDonald** involved a defendant charged with a minor traffic offense---prosecuted as an "infraction", for which statutorily there could be no possibility whatsoever of any incarceration! [As noted previously, much of what was stated in the **McDonald** decision might merely be dicta.] To have the trial judge "order" (August 20, 1998, as the "docket history" shows: see

ADDENDUM #5 in Appellant's Brief] the case be set for "jury trial" (in response to Defendant's demand therefor), and then, ON THE MORNING THE CASE IS SCHEDULED FOR TRIAL, order that the case will proceed without a jury (because no jury had been called) is an "abuse of discretion". For the trial court to announce that "no jail will be imposed if I find you guilty" is not the proper way to do things. Such a cavalier method is certainly not very "judicial".

The significant jurisprudential principles behind **McDonald** should be re-examined! The **McDonald** "holding" (sic) should be reversed or at least narrowed!

### III

#### "SINGLE-CRIMINAL EPISODE" PROVISIONS PRECLUDE CONVICTION OF BOTH OFFENSES

Appellee's counsel superficially explains the particular factual and legal theory upon which he believes---appellate counsel was NOT the trial counsel---the case was tried. Unfortunately, that explanation relies heavily upon the judge's announced verdict (as explained at the sentencing hearing). The explanation ignores, however, the factual and legal issues associated with the charged offenses and the claimed proof thereof.

The prosecution believes that the "15 minute" time differential between the two offenses interrupts the

"single criminal episode" and makes it two offenses. That's not true.

Both actions---or series of actions---had to be related, in time and geographic proximity, to each other. The "photos offense" had to be related to the "telephone books offense", for without the taking of the telephone books there could be no offense.

Similarly, the statute expressly provides that a person shall not be convicted of the "substantive offense" and of an "attempt" when the same arises from a "single criminal episode". The prosecution---especially when the prosecution so intentionally and consistently "stonewalled" the Defendant on the sought-for bill of particulars to specifically identify the specific property alleged to have been taken as relates to each specific charge---ought not to be allowed to now compartmentalize the charges and with "stopwatch accuracy" plead that one offense (i.e. the "theft by deception" of the photographs, which was NOT the offense the prosecution set out to prove) was committed and fully consummated minutes before the second offense (i.e. that of "attempted theft" of the telephone books) was committed and consummated.



#### IV

##### THE "THEFT BY DECEPTION" VERDICT CANNOT STAND

The prosecution claims the "theft by deception" charge is supported by the evidence and conforms to the statute. [The Defendant-Appellant again points out this is NOT the charge (i.e. related to the photographs) the prosecution set out to prove at trial!]

The appellate counsel for the City ignores two things. First, that "theft by deception" requires an "economic" aspect of the crime. The statute says so! The law should not presume---as the City's appellate counsel seems to suggest---that if a citizen asks to inspect a public record and is handed the file, there is a "deception" which occurs if the citizen fails to give back the entire file (or opens the file and/or removes---for convenience in examining the individual documents within that file---some of those documents from the actual confines of the physical file.

Secondly, the witness who gave Mr Decker the file testified that she was NOT deceived.

Utah law requires that there be "reliance" in "theft by deception" cases. In **State vs Jones**, 657 P.2d 1263 (Utah Supreme Court 1982), the Utah Supreme Court wrote:

It is clear from the face of the statute that **reliance by the victim is an element of**

the crime of theft by deception. In context, obtaining property "by deception" can only mean "by means of deception." Deception, followed by transfer of property to the deceiver, does not add up to theft by deception without the causal element of reliance. Even though the alleged victim is deceived, if he does not rely on the deception in parting with his property, there has been no theft "by deception". State v. Vatsis, 10 Utah 2d 244, 246-47. 351 P.2d 96, 97-98 (1960) (involving statutory predecessor of §76-6-405(1), which also contained no express reference to "reliance"); State v. Finch, 223 Kan. 398, 573 P.2d 1048 (1978).

657 P.2d at 1267. Emphasis added.

When the prosecution's own witness testifies that there was "no deception", the trial court's finding is not supported by the evidence. The conviction cannot stand!

### CONCLUSION

The Defendant has been unfairly prejudiced by the prosecutor's repeated failure to provide the "bill of particulars", specifically describing the items of property alleged to have been stolen or attempted to have been stolen. This failure resulted in the Defendant---misled by the "open file" disclosure as to the prosecutor's theory---defending against charges exactly opposite of what the trial court judge found him guilty of!

The Defendant has made a "credible argument" that the pre-trial discovery disclosure (i.e. access to the

prosecution's "screening worksheet") improperly distracted the Defendant and his counsel from the "theory of guilt" of the charged offenses actually accepted by the trial judge. The prosecuting attorney has not met the "shifted burden" requirements imposed upon him of convincing the appellate court was "harmless error". **Bell**, supra, and **Knight**, supra.


The trial court's refusal to grant the timely-demanded "jury trial", for these serious misdemeanor offenses, is unjustified. The Rules do not require the Defendant to "reconfirm" his "demand". The **McDonald** decision is inappropriate to this factual situation and/or should be more carefully revisited, by this case which does present the constitutional question properly and by a party who has standing to assert that constitutional question.

The "dual" convictions (i.e. of both offenses) is clearly precluded by the "single criminal episode" statute. Furthermore, the status of the confusing evidence is such that the trial court's own findings evidence the prosecution's failure to prove the accused's guilt "beyond a reasonable doubt".

The Defendant's conviction of both offenses should be set aside. The case should be remanded to the District Court for a jury trial, following the

providing of a "bill of particulars" identifying the property in question. In the alternative, the charges should be dismissed, outright, as the prosecution simply failed to prove its case beyond a reasonable doubt.

Respectfully submitted this 7th day of September, 1999.

  
STEPHEN G HOMER  
Attorney for Appellant  
JAMES WESTON DECKER

**CERTIFICATE OF DELIVERY**

I certify that I caused two copies of the foregoing APPELLANT'S REPLY BRIEF to be mailed, first-class postage prepaid, to Mr Elliot R Lawrence, Attorney at Law, Office of the West Valley City Attorney, 3600 South Constitution Boulevard, West Valley City, Utah 84119, this 7th day of September, 1999.

