

1999

# West Valley City v. James Weston Decker : Petition for Rehearing

Utah Court of Appeals

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Stephen G Homer; Attorney at Law; Attorney for Appellant James Weston Decker.

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## Recommended Citation

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IN THE UTAH COURT OF APPEALS

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

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APPELLANT'S PETITION FOR REHEARING

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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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WEST VALLEY CITY

**FILLED**  
Utah Court of Appeals  
APR 20 2000  
Julia D'Alesandro  
Clerk of the Court

IN THE UTAH COURT OF APPEALS

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

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## CERTIFICATION OF COUNSEL

The following APPELLANT'S PETITION FOR REHEARING is submitted in good faith and not for purpose of delay.

## ARGUMENT

### I

#### THE TRIAL COURT'S DENIAL OF THE BILL OF PARTICULARS WORKED TO THE SUBSTANTIAL PREJUDICE OF THE DEFENDANT

The Court of Appeals' "Memorandum Decision" expressly decides the "theft by deception" charge was not proven. This is absolutely correct and on point. However, the decision then **finds** the Defendant guilty of the "attempted theft" charge. [Implicit in that decision is the fact that the "telephone books" charge is seemingly ignored, ostensibly on the basis that the telephone books were in fact set out for "free distribution" to members of the public. [The free distribution was correctly noted in a footnote to the "Memorandum Decision" opinion.] Thus, in essence, the Court of Appeals has reversed the trial court judge on the "photographs" charge (i.e. "theft by deception") and proceeded nevertheless to find the Defendant guilty of the "attempted theft" charge involving the same photographs.

In responding to the "bill of particulars" argument, the "Memorandum Decision" mistakenly focuses

upon the "abuse of discretion" standard articulated in **State vs Swapp**, 806 p.2d 115 (Utah Court of Appeals 1991). Although the "abuse of discretion" standard might be applicable in most cases, the application of that standard to the instant case is inappropriate for the following reasons. The "abuse of discretion" standard is applicable in cases where the trial judge is fully informed! In the instant situation, the trial judge was AS MUCH CONFUSED as was the Defendant as to the true nature of the charges. Thus, in this situation, the better analysis is to focus upon what has actually happened. [Furthermore, a reading of the **Swapp** decision shows that the prosecution in that case carefully---including the filing of a 12-page affidavit---its legal theory of the accused's guilt. The defense was not mislead. Nor was there an opportunity for the "flip-flopping" of the charges and the resultant conviction, as has occurred in the instant case.] The problem is not, per se, one of "notice" to the accused; rather, the problem involves the "shifting target" approach of a vague charging document, against which he cannot be expected to prepare an "adequate defense", because the charge keeps moving---as evidenced by the Court's decision!

It is a fundamental principle of appellate

jurisprudence that the appellate court does not necessarily "weigh" the evidence (as does the trier-of-fact), but merely reviews the evidence to insure that just and proper results have been obtained. In the instant decision, the Court of Appeals seemingly has "weighed" the evidence on the "attempted theft" charge and applied the same to the "photographs". This is unfortunate and prejudicial to the Defendant.

First, the Defendant has been found guilty of an offense ("attempted theft" of the photographs) which the trial court did not find him guilty of. Secondly, the offense of "attempted theft" was so poorly and improperly pleaded, it is debatable whether or not the trial judge would have found the Defendant guilty of that offense, had it been properly charged---which it was not.

The material allegations in the Information merely recite the phrasing contained in the statute. [It's a verbatim recitation of the statutory text! No attempt is even made to "personalize" the same to the Defendant or to the alleged criminal conduct. The "attempted theft" DOES NOT even contain the requisite statutory text customarily used to allege an "attempt".] Items such as (1) the property description and (2) the victim (as owner of that property) are NOT identified.

Had the Information been properly worded so as to allege "attempted theft", the Information would have contained at least two "elements" of the alleged offense which are material to a conviction: namely, that the Defendant (1) undertook a "substantial step" toward the commission of the offense, AND (2) that the Defendant's action (i.e. the "substantial step") was "strongly corroborative of the actor's mental intent" necessary for the consummation and/or commission of the offense. Thus, the positioning of the photographs was very, very material to the charge. However, the trial court was---apparently---not thinking about the photographs in the context of the "attempted theft" charge; Judge Boyden was pre-occupied with the "theft by deception". Thus, was Judge Boyden even cognizant of the two elements (i.e. "substantial step" and "strongly corroborative of actor's mental intent") insofar as such related to the evidence and the inferences to be drawn therefrom? We don't know. [Although trial judge's are probably presumed to know the law in the cases presented to them, we cannot safely indulge in that presumption in this case. The Court of Appeals has, in essence, ruled as a matter of law, that the "theft by deception" charge cannot stand and that the evidence would not support the conviction. But Judge Boyden was

firm in her analysis as to the "deception". She incorrectly applied the law in that particular. Judge Boyden was similarly in error on the "single criminal episode" aspects of the dual convictions, now made moot by the Court of Appeals decision. Could it not be said that Judge Boyden---charged not only with applying the law, but also carefully listening for the operative facts---misapplied things in the "attempted theft" case. She wasn't really listening for the nuances associated with that charge, because she was so intently focused upon the "deception" charge which she thought referred to the photographs and she so found, albeit incorrectly on the legal issue.

The Court of Appeals---in a three-judge, unanimous decision---has now overruled Judge Boyden and has properly set aside the "theft by deception" charge. But the Court of Appeals has now applied---"transferred" is a more accurate term---the "attempted theft" charge to those same photographs!

Given AS MUCH JUDICIAL CONFUSION as there IS AND WAS concerning this case and the evidentiary basis needed for this conviction, can the Court of Appeals say that the evidence is so compelling that it proves, beyond a reasonable doubt", that the Defendant engaged in a "substantial step" towards the commission of the



offense, which step was simultaneously "strongly corroborative" of the requisite mental state needed for theft? Since the trial judge didn't make that determination (in the context of the "photographs"), wouldn't it be better---jurisprudentially---to allow the trial court (on remand) to make that decision?

The "bill of particulars" issue is NOT MERELY that the accused is entitled to know what specific incident is before the trial court; the Defendant was well aware of the incident. THE ISSUE IS whether or not the allegations of criminal conduct are sufficiently narrowed so that the accused can "prepare an adequate defense". Given the flip-flop status of the case, who can say that the Defense would have done things differently, if the charged offenses were more precisely pleaded? [The prosecutor of those offenses---who is not appellate counsel---will want the most "loose" charging document possible: so as to preserve the maximum number of options. In this case, it worked: Judge Boyden "bought into" the "deception" charge, even though that was not, theoretically, what the prosecutor set out to prove---or at least told the Defendant the prosecutor was attempting to prove! In this same vein, the Court of Appeals has succumbed to the same "looseness": the "Memorandum Decision" results in a

"guilty" verdict to the charge opposite to what the trial court found!

Is it that difficult for the prosecution to spell out (1) the specific description of the property alleged to have been stolen and (2) the "owner" of that property? [West Valley City didn't want to assert that it was the "owner" of the telephone books, because the City wasn't!] Now, when the Court of Appeals has the opportunity to set things straight, wouldn't it be better to take this opportunity to set things straight as far as the "bill of particulars" issue?

The vague, ambiguous "disclose nothing" allegations which are merely the recitation of the statutory phrasing---a prosecutorial practice already condemned by judicial decision in the **Bell** case [770 P.2d 100 (Utah Supreme Court 1988)]---ought not be condoned, expressly or implicitly. Given the judicial confusion, the historic "abuse of discretion" standard for reviewing the trial court's decision is not adequate. The trial court was, ultimately, as confused as everyone due to the prosecution's willful failure to provide the necessary information. That failure has obviously worked to the prejudice of the accused.

The prejudicial effect upon the accused is illustrated further by this example:

IF the charging document (information) had expressly alleged---as was apparently the prosecution's theory of guilt understood by the trial judge---that the "attempted theft" charge related to the "telephone books" which were the property of "telephone book company", would the Court of Appeals now be so inclined to now find the Defendant "guilty" of "attempted theft" of the "photographs" as "property of the City"? I hope not!

The prejudice to the Defendant IS ESTABLISHED, consistent with the standards articulated in **Bell**. [In this vein, the fact that the Information is so VAGUELY WORDED as to allow the flip-flopping of the conviction by the Court of Appeals involves the Court of Appeals in the very problem that the trial judge was involved in---all to the accused's detriment!]

To have the Court of Appeals now "weigh" the evidence, without hearing the actual live witnesses and seeing their demeanor and ascertaining the nuances within their testimony (the proof of the attempt is couched in terms of "undertakes a substantial step towards the commission of the offense" and that the "substantial step" must be "strongly corroborative" of the accused's guilty "intent" is error!

In this regard, it is the function of the Court of Appeals to review the conviction to determine whether or not there was sufficient evidence to support the guilty verdict; it is NOT the function of the Court of Appeals---as it has now done---to evaluate the evidence

to ascertain whether the accused is in fact guilty of an offense which the trial judge didn't find the Defendant guilty of! This should be particularly the case in a situation which focuses upon the accused's "intent" (necessary for a "theft" or "attempted theft" conviction)!

The case should be remanded for re-trial on the properly-alleged "attempted theft" charge.

## II

### **THE APPELLANT'S "UTAH CONSTITUTION" CLAIMS HAVE NOT BEEN DECIDED BY THE McDONALD DECISION**

The Memorandum Decision seemingly notes---incorrectly---that the trial court had decided that incarceration was not going to be a sentencing option, such having been "eliminated" at the trial court's denial of the jury trial! That's what Judge Boyden sort-of SAID (at the November trial, when the jury was not called or empaneled). But that's NOT what Judge Boyden DID (at the December 14th sentencing). On December 14th she sentenced the Defendant to "15 days in jail" (on the "theft by deception" charge involving the photographs) and "5 days in jail" (on the "attempted theft" charge, ostensibly involving the telephone books). The execution of those jail terms was suspended upon the Defendant's timely performance of "80 hours" of "community service". [Although the

breakdown of the "80 hours" is not shown on the written document prepared by the Clerk of the Court, the announced breakdown was 56 hours for the Class B "theft by deception" charge (the photographs, now dismissed by the Court of Appeals) and 24 hours on the "attempted theft" charge (now applied by the Court of Appeals to the photographs). No monetary fine was imposed.

#### **A**

The provisions of the Utah Constitution---Sections 10 AND 12 of Article I thereof---are absolutely clear: the charged criminal defendant IS ENTITLED to a "jury trial". The Defendant made timely written demand for a "jury trial". The "jury trial" was scheduled, months before the trial date! The trial court's own "daily calendar" indicates the case (and other cases that same day) were scheduled for "jury trial"! [At the time of the denial, the trial court had before it TWO OFFENSES, although arising out of the "same criminal episode", for which the aggregate incarceration was NINE MONTHS!] To now, in hindsight, say the accused was charged with a federally-described "petty offense"---a phrase not found in the Utah Constitution---is in error!

This Court should not countenance the denial of a timely-filed jury demand, for an offense for which a jury trial is statutorily warranted, merely because the

trial court doesn't want to call a jury. Furthermore, the trial court judge ought not to be making those kind of pre-trial inquiries as to the nature of the case and/or the criminal background, if any, of the Defendant before the trial. To do so unfairly prejudices the Defendant!

The Utah Constitution may afford greater rights to accused persons than are afforded rights under the corresponding federal (national) Constitution. See, for example, Durham, "Employing the Utah Constitution in the Utah Courts", **Utah Bar Journal**, November 1989, pp. 25-27. See also **State vs Larocco**, 794 P.2d 460 (Utah Supreme Court 1990) [holding (in a plurality opinion) that automobiles are afforded a greater degree of protection under Article I, Section 14 of the Utah Constitution than under the United States Constitution (Fourth Amendment), which has almost exactly the same wording!]. C.f. **State vs Strickling**, 844 P.2d 979 (Utah Court of Appeals 1992) ["A fundamental departure from the well-established law regarding inventory searches . . . (if) based on the Utah Constitution, must come, if at all, from the Utah Supreme Court." 844 P.2d at \_\_\_\_].

That the accused's right to a "jury trial" is mentioned in TWO separate provisions of the Utah

Constitution is significant! The right is unqualified and absolute!

**B**

In this same vein, the Court's reliance upon the **West Valley City vs McDonald** decision is grossly misplaced. **McDonald** involved a traffic violation! The trial judge reduced the charge to an "infraction", thus precluding---per statute---the possibility of sentence of incarceration. The Court of Appeals found such to be permissible. But to now say---as the Memorandum Decision does, implicitly and expressly---that **McDonald** is precedent authority to deny the Appellant's claims is wrong. First, because Judge Boyden DID IMPOSE a sentence of incarceration! And secondly, because the accused has an absolute "constitutional right" to have a jury trial of this very important charge, which has serious personal ramifications (i.e. employment, veracity as a witness in future proceedings, etc.) beyond whether or not he is incarcerated.

The **McDonald** decision affirmatively acknowledges that the appellant therein DID NOT properly present the "state constitutional claim" on appeal and the case was not thus adjudicated thereunder. The Court of Appeals ought not to cite to **McDonald** as authority to dispose of the Appellant's "state constitution" claims which

have properly raised and preserved! The weighty "constitutional right"---under the Utah Constitution--- of a citizen's "right to a jury trial" was NOT DECIDED in the **McDonald** decision. Thus, **McDonald** is NOT precedent for the summary disposition of Appellant's claims, which should be more fully considered by the Court of Appeals.

#### CONCLUSION

That the Court of Appeals, while correctly adjudicating the "theft by deception" charge, can seemingly "transfer" the conviction to the "attempted theft" charge contained within the Information shows the necessity for the bill of particulars! That the Court of Appeals has---properly, in the context of the "deception" charge---overturned that conviction but nevertheless flip-flopped the charges establishes the judicial confusion of the case at hand. Obviously, the "confidence" in the proceedings below "has been eroded" such that a re-trial of the "attempted theft" charge is warranted!

The Defendant has made a "credible argument" that the results might have been different, had the "bill of particulars" (identifying the specific items of property sought to have been stolen) been provided. 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.

**McDonald** did NOT adjudicate nor create case-law precedent for the disposition of the "Utah Constitution" claims of denial of right to a jury trial. The Appellant's claims are valid and should be more fully considered.

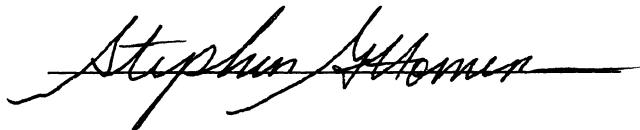
Following decision on the "jury trial" issue, the case should be remanded to the district court for trial, with instructions that the court require the prosecution to specifically identify the property which is subject to the "attempted theft" charge.

Respectfully submitted this 20th day of April, 2000.

  
STEPHEN G. HOMER  
Attorney for Appellant  
JAMES WESTON DECKER

**CERTIFICATE OF MAILING**

I certify that I caused two copies of the foregoing APPELLANT'S PETITION FOR REHEARING 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 20th day of April, 2000.



FILED

APR 06 2000

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

West Valley City,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Plaintiff and Appellee,	)	
	)	Case No. 990029-CA
v.	)	
	)	F I L E D
James W. Decker,	)	(April 6, 2000)
	)	
Defendant and Appellant.	)	<u>2000 UT App 97</u>

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Third District, West Valley Department  
The Honorable Ann Boyden

Attorneys: Stephen G. Homer, West Jordan, for Appellant  
Elliot R. Lawrence, West Valley City, for Appellee

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Before Judges Bench, Billings, and Orme.

BENCH, Judge:

Decker contends that the evidence adduced at trial was insufficient to support his convictions of attempted theft and theft by deception. We disagree that the evidence was insufficient to support Decker's attempted theft conviction. The evidence established that Decker removed some photographs from the City's file and hid them between two telephone books.<sup>1</sup> Decker then returned the file, minus the photographs. Decker later picked up the telephone books and left the building, unaware that City employees had retrieved the photographs while he paid for some copies. These facts sufficiently support the attempted theft conviction because they demonstrate that Decker "engage[d] in conduct constituting a substantial step toward the commission of the offense." Utah Code Ann. § 76-4-101(1) (1999). In other words, the evidence adequately established that Decker attempted to "obtain[] or exercise[] unauthorized control over the property of [the City] with a purpose to deprive [it] thereof." Id. § 76-6-404.

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1. Although not important to our analysis, the City apparently provided the telephone books free to the public.

The evidence, however, was not sufficient to support the conviction of theft by deception because Decker deceived no one in his attempt to steal the photos. See State v. Jones, 657 P.2d 1263, 1267 (Utah 1982) (stating that "reliance by the victim [upon the deception] is an element of the crime of theft by deception"). The City employees saw Decker hide the photographs and then retrieve them when Decker left for a moment. Thus, we reverse Decker's theft by deception conviction because the statute does not include "situations where theft by deception might have happened, but, because of the victim's lack of reliance on the perpetrator's deception, did not occur." State v. LeFevre, 825 P.2d 681, 688 (Utah Ct. App. 1992)."

Decker also contends that the trial court erred in denying his motion for a bill of particulars. "We will not reverse the trial court's decision to deny a bill of particulars unless the trial court has abused its discretion." State v. Swapp, 808 P.2d 115, 117 (Utah Ct. App. 1991). In this case, Decker had the following: the information; the City's objection to his motion wherein the City set out the facts that led to the charges; and open access to the prosecution's file. Given all that the City provided Decker, the trial court did not abuse its discretion in denying his request for a bill of particulars because it was "'sufficient information" so that he [could] know the particulars of the alleged wrongful conduct and [could] adequately prepare his defense.'" Id. at 117-18 (citations omitted).

Finally, Decker argues that the trial court erred in denying his request for a jury trial. Because the charges against Decker carried maximum prison terms of six months or less, Decker was not entitled to a jury trial. See West Valley City v. McDonald, 948 P.2d 371, 375 (Utah Ct. App. 1997). Moreover, "the trial court agreed to eliminate jail time from its sentencing options," and therefore, "it no longer was required under Utah law to grant [Decker's] request for a jury trial." Id. at 374.

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2. Because the evidence was insufficient to support the theft by deception conviction, we need not address Decker's argument that the "single criminal episode" provision precludes prosecution of multiple offenses. See Utah Code Ann. § 76-1-402 (1999).

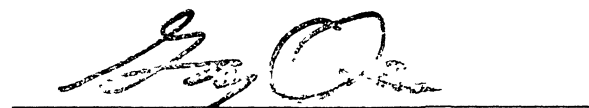
Accordingly, we affirm the conviction of attempted theft and reverse the conviction of theft by deception.

  
Russell W. Bench, Judge

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WE CONCUR:

  
Judith M. Billings, Judge

  
Gregory K. Orme, Judge

Third District Court, State of Utah  
Salt Lake City, West Valley Department  
3636 S Constitution Blvd, WVC, UT 84119

SENTENCE / JUDGMENT FORM

CITY / STATE \_\_\_\_\_ Plaintiff  
VS  
James W Decker  
Defendant  
DOB 11 / 7 / 50  
CASE NUMBER 98111105  
DATE 1-14-99  
JUDGE Ann Boyden  
CLERK WVC  
Plaintiff Counsel J. Miller  
Defense Counsel James  
Interpreter \_\_\_\_\_

CHARGES AMENDED  
"1st" Theft  
"2nd" Theft by Receipt

THE COURT SENTENCED THE DEFENDANT AS FOLLOWS:

(1) FINE AMT \$ _____	SUSP \$ _____	JAIL <u>5</u>	SUSP <u>5</u>
FINE AMT \$ _____	SUSP \$ _____	JAIL <u>15</u>	SUSP <u>15</u>
FINE AMT \$ _____	SUSP \$ _____	JAIL _____	SUSP _____
FINE AMT \$ _____	SUSP \$ _____	JAIL _____	SUSP _____
FINE AMT \$ _____	SUSP \$ _____	JAIL _____	SUSP _____
FINE AMT \$ _____	SUSP \$ _____	JAIL _____	SUSP _____

(2) RESTITUTION \$ \_\_\_\_\_ Pay to \_\_\_\_\_ Court \_\_\_\_\_ Victim \_\_\_\_\_ Show Proof to Court

(3) COURT COSTS \$ \_\_\_\_\_

(4) ATTORNEY FEES \$ \_\_\_\_\_

TOTAL DUE \$ \_\_\_\_\_

Payment Schedule: Pay \$ \_\_\_\_\_ mo \_\_\_\_\_ 1st Pmt Due \_\_\_\_\_ Last Pmt Due \_\_\_\_\_

(5) Community Service in lieu of Jail / Fine \_\_\_\_\_ Hrs \_\_\_\_\_ Date Due 1-15-99

(6) ~~Community Service in lieu of Jail / Fine \_\_\_\_\_ Hrs \_\_\_\_\_ Date Due \_\_\_\_\_~~

(7) TERMS OF PROBATION / TUA

- |  |   |
|--|---|
| <input type="checkbox"/> No Further Violations               | <input type="checkbox"/> Counseling thru _____  |
| <input type="checkbox"/> AA Meetings _____ /wk _____ /month  | <input type="checkbox"/> Classes _____          |
| <input type="checkbox"/> Random UAs                          | <input type="checkbox"/> In/Out Treatment _____ |
| <input type="checkbox"/> No Alcohol/non prescribed Cont Subs | <input type="checkbox"/> Health Testing _____   |
| <input type="checkbox"/> Ant abuse                           | <input type="checkbox"/> Employment _____       |

Proof Of Community service 12 hrs each month

☒ OTHER sentencing 1-15-99

APPEAL MUST BE FILED WITHIN  
30 DAYS OF JUDGMENT

X James W Decker  
Defendant

Ann Boyden  
District Court Judge  
By \_\_\_\_\_  
CLERK OF COURT