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IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH, Plaintiff-Respondent, -vs- RONALD G. CLARK, Defendant-Appellant.	:	Case No. 17037

BRIEF OF RESPONDENT

APPEAL FROM A JUDGMENT OF CONVICTION AND SENTENCE OF THE SIXTH JUDICIAL DISTRICT COURT, IN AND FOR SANPETE COUNTY, STATE OF UTAH, THE HONORABLE DON V. TIBBS, JUDGE

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FILED

NOV 21 1980

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-vs-	:	Case No. 17037
RONALD G. CLARK,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

The appellant, Ronald G. Clark, was charged with the theft of three turkeys in violation of § 76-6-404 and § 76-6-412(1)(b)(iii) Utah Code Annotated (1953), as amended.

DISPOSITION IN THE LOWER COURT

On February 29, 1980 trial was held before the Honorable Don V. Tibbs, Judge in and for the Sixth Judicial District Court of Sanpete County, State of Utah, sitting without a jury. Judge Tibbs found the appellant guilty of theft, a third degree felony, as charged. On April 9, 1980 the appellant was sentenced to a term not to exceed five years in the Utah State Prison and fined the sum of $1500.00. Judge Tibbs suspended the prison sentence, and placed the

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appellant on probation for two years upon the conditions that the appellant serve ninety (90) days in the Juab County Jail, make restitution in the amount of $45.00, refrain from the use of any intoxicants, and not possess any weapons during the term of probation.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmation of the guilty verdict rendered and of the sentence imposed, and affirmation of the constitutionality of Section 76-6-412(1)(b)(iii) Utah Code Annotated (1953), as amended.

STATEMENT OF THE FACTS

On October 19, 1979, at approximately 2:00 a.m., Richard Ray Olsen and his brother Douglas Hall Olsen were on their turkey farm located approximately four miles north of Ephraim, Utah. As they were leaving their farm they saw the appellant inside one of their fenced turkey pens (R. 16, 22). Richard Olsen testified that he heard a truck idling, and both brothers heard someone hitting the turkeys (R. 17, 23).

The brothers walked to the idling truck and watched the appellant in their turkey pens (R. 17). The appellant approached the two brothers carrying three dead turkeys (R. 17, 23). The brothers confronted the appellant asking him what he was doing (R. 18, 23). Appellant dropped the turkeys and replied, "I'm just picking up dead turkeys." (R. 18, 23).

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A substantial discussion between the appellant and the two brothers followed, lasting for almost three hours (R. 19), during which time the appellant denied any wrong doing (R. 24). Douglas Olsen finally left the turkey farm to notify the sheriff (R. 26) when it appeared that the appellant would not let the Olsens "take him in." (R. 20). Appellant was finally arrested in Ephraim after he followed Richard Olsen into town (R. 20).

Appellant was charged with violating Sections 76-6-404 and 76-6-412(1)(b)(iii) Utah Code Annotated (1953), as amended to which he entered a plea of not guilty. In addition to the testimony of the Olsen brothers, the testimony of the investigating officer was stipulated to. Officer Buchanan would have testified that boots taken from the defendant had fresh blood on them, and that he found a base ball bat in the turkey pen with fresh blood on it (R. 30). Appellant's counsel had no objection to the admission of the proffered testimony (R. 30).

After the prosecution rested its case, the appellant moved to have the information dismissed on the ground the state had failed to meet the elements of the crime of theft (R. 31). This motion was denied and the case submitted to the court (R. 32).

The trial judge found the appellant guilty of theft

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as charged (R. 33). Although appellant's counsel was willing to waive the time for sentencing, the court ordered a pre-sentence investigation and report (R. 35).

ARGUMENT

POINT I

SECTION 76-6-412(1)(b)(iii) U.C.A. (1953), AS AMENDED, DOES NOT VIOLATE EQUAL PROTECTION.

Appellant contends that Section 76-6-412 (1)(b)(iii) Utah Code Annotated (1953), as amended, which classifies the theft of livestock, including poultry, as a third degree felony, denies equal protection in that it makes no reference to the value of the animals stolen in determining the felonious nature of the offense. It is respondent's position that the legislative classification is reasonable, and therefore the statute does not deny equal protection under either the Constitution of the United States or the Constitution of Utah.

Although appellant correctly cites State v. Logan, 563 P.2d 811 (Utah 1977) for the proposition that market value is the appropriate test to be used in determining the value of stolen property, appellant has failed to cite the entire language of Logan. This Court in Logan stated:

> In general, the common law gradation of the offense of larceny that is based on the value of the property stolen has been retained in most jurisdictions, and in the absence of statutes providing otherwise, the measure of the value is its fair market value at the time and place where the alleged crime was committed. [Footnotes omitted] (Emphasis added)

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Id. at 813. The language of Logan indicates that market value is to be used only if there is no statute, "providing otherwise." Such is not the case here. In this case a specific statutory provision classifies the theft of animals, including poultry, as a third degree felony. Specific statutes making theft a felony regardless of the value of the thing stolen have consistently been held valid. See 52A C.J.S. §62.

In states having statutes similar to Utah's livestock theft statute, Section 76-6-412(1)(b)(iii) U.C.A., challenges based on equal protection have failed. In People v. Burns, 593 P.2d 351 (Colo. 1979), the Colorado Supreme Court confronted an identical challenge to the one before this Court. The appellant in Burns was convicted of the theft of a calf. On appeal, appellant contended that the Colorado "theft of animals" statute which classified the theft as a felony, was unconstitutional. The appellant claimed that the value of the calf was $40-50 and therefore he would only be guilty of a misdemeanor, but for the specific "theft of animals" statute. Like the appellant in the instant case, Burns argued that such a distinction deprived him of equal protection of the law. The Colorado Court rejected his argument stating:

> We find this challenge to be without merit. An equal protection problem arises only where different statutes prescribe different penalties for the same conduct. However, the theft of animals statute relates specifically

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> to theft of animals, conduct which is distinguishable from theft of other articles. This distinction has been made by the legislature, which obviously has concluded that theft of animals is a crime of greater consequence to society in this state than a general theft and that it requires a greater penalty.
>
> In People v. Czajkowski, 193 Colo. 352, 568 P.2d 23 (1977), we addressed the same challenge with respect to the "theft of auto parts" statute. We said there:
>
> > "Simply because an act may violate more than one statutory provision does not invalidate the legislation in question, so long as the legislative classification is not arbitrary or unreasonable, and the differences in the provisions bear a reasonable relationship to the persons included and the public policy to be achieved. [Citations omitted.]" 568 P.2d at 25.
>
> The Czajkowski rationale is controlling here. We do not think that the distinction made by the legislature between a general theft and theft of animals is arbitrary or unreasonable. Rather, it displays a legitimate legislative judgment. Thus there is no violation of equal protection here. People v. Marshall, Colo., 586 P.2d 41 (1978).

Id. at 353. [Footnotes omitted] (emphasis added).

Likewise in State v. Webb, 528 P.2d 669 (Idaho 1974), the appellant argued that classifying theft of livestock, regardless of value, into one class for the purpose of fixing the degree of the offense was unreasonable, arbitrary, and discriminatory. In affirming the constitutionality of the

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Idaho statute, the Court reviewed the history of the legislation:

> Since territorial times Idaho has consistently treated the larceny of livestock differently from larceny of other personalty, in that the punishment for larceny of livestock has not been dependent on the monetary value of the property taken. [Citations omitted] Other states have affirmed the validity of statutes specifically classifying the larceny of livestock separately and providing harsher penalties than for other types of larceny. See, State v. Pacheco, 81 N.M. 97, 463 P.2d 521 (Ct. App. 1969); People v. Andrich, 135 Cal. App. 274, 26 P.2d 902 (1933). Historically, the protection of certain classes of property, in this case livestock, was considered essential to deter a type of theft easy of commission, but difficult to detect.
>
> Legislatures are accorded wide discretion in both the classification of subject matter to be protected by criminal laws and in the establishment of punishments for the violation of such criminal laws.

Id. at 670. The Idaho Court determined that the classification of livestock theft was reasonable, stating:

> The legislature specifically designated larceny of livestock as an "evil" to be regulated with stricter penalties than other types of larceny. The separate classification of larceny of livestock bears a reasonable relationship to the protection of an industry difficult to safeguard while marking a class of offenders which experience dictates as deserving special treatment. We find no merit in the defendant's argument that the legislature's specific classification of larceny for livestock with

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> resulting harsher penalties in relation to other degrees of larceny deprived him of any constitutional safeguards or rights.

Id. at 671.

The Utah legislature has similarly determined that theft of livestock is an "evil" requiring harsher penalties than other thefts. Separate classifications for livestock have been in effect in Utah since 1876.

This Court stated in In re Gannett, 11 U. 283, 39 P. 496 (Utah 1895):

> The degree of such an offense does not depend on the value of the property stolen, because it is made grand larceny byt the statute, regardless of value, and must be punished likewise.

Id. at 497. (Emphasis added.)

Appellant also argues that Section 76-6-412(1)(b)(iii) Utah Code Annotated (1953), as amended violates equal protection because it allows a prosecutor to charge either a felony or a misdemeanor on the same set of facts. However, as long as there exists a reasonable basis for distinguishing between theft of animals and theft based on the value of the object taken, the fact that an act can be either a felony or misdemeanor does not create a constitutional objection, nor does it confer upon the defendant a constitutional right to be prosecuted for a misdemeanor. State v. Dumont, 471 P.2d 847 (Ore.App. 1970).

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The legislature has determined that the theft of livestock, including poultry is a more severe offense than the theft of three frozen turkeys from a supermarket. The distinction is both reasonable and rationale. As the New Mexico Court stated in State v. Pacheco, 463 P.2d 521 (1969):

> . . . the larceny of livestock statute was apparently enacted to protect the ownership of thereof, to prevent a kind of larceny peculiarly easy of commission and difficult of discovery and punishment, and to protect the important industry of stock raising.

Id. at 524.

The classification of theft of livestock as a third degree felony regardless of the value of the animals is a reasonable legislative distinction, and as such is not a violation of equal protection. Respondent respectfully asks this Court to reject appellant's constitutional challenge and to affirm the constitutionality of Section 76-6-412(1)(b)(iii).

POINT II

SECTION 76-6-412(1)(b)(iii) IS NOT UNCONSTITUTIONAL SINCE IT APPLIES EQUALLY TO ALL CITIZENS; NOR IS IT A SPECIAL LAW IN VIOLATION OF ARTICLE VI, SECTION 26 OF THE CONSTITUTION OF UTAH.

Appellant asserts that Section 76-6-412(1)(b)(iii) Utah Code Annotated (1953), as amended, is a private or

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special law contrary to Article VI, Section 26 of the Constitution of Utah. Respondent submits that the statute is a general law, therefore the statute is constitutional since it applies equally to all persons who steal livestock in the State of Utah. Furthermore, legislative enactments are presumed valid absent a showing that the legislature went beyond the Constitution.

In McGuire v. University of Utah Medical Center, 603 P.2d 786 (Utah 1979), this Court wrote:

> In Utah Farm Bureau Insurance Co. v. Utah Insurance Guaranty Assoc., 564 P.2d 751 (Utah 1977), this Court defined a general law as one which applies to and operates uniformly upon all members of any class of persons.

Id at 788.

Such is the case with the Utah livestock statute. All persons who steal livestock in Utah are subject to prosecution under Section 76-6-412(1)(b)(iii) Utah Code Annotated. The statute does not rest on an arbitrary classification, nor does it invidiously discriminate. In a similar challenge to the one now before this Court, the appellant in State v. Pacheco, 463 P.2d 521 (New Mexico App. 1969) argued that the theft of livestock statute under which he was sentenced violated the special legislation provisions of the Constitution of New Mexico. The challenged provision of the New Mexico Constitution is comparable to

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Article VI, Section 26 of the Utah Constitution. In rejecting the appellant's claim the court found that the portion of the larceny statute making it a felony to steal livestock regardless of its value thereof applied to all persons who steal livestock in New Mexico and therefore did not constitute special legislation contrary to the New Mexico Constitution.

Furthermore, appellant's contentions that the statute was enacted as a result of special interest lobbying is an argument which can be applied to many kinds of legislation. An individual selling real estate without a license would be able to assert that the licensing requirement was a special law enacted by the legislature in response to efforts by realtors to limit their numbers. Adoption of appellant's argument would open the floodgates to claims of "special laws."

Finally appellant has merely speculated that the legislature amended Section 76-6-412(1)(b)(iii) to include poultry because of lobbying efforts. It cannot be assumed that the legislature acted without exercising its own discretion. As the New Mexico Court said in Pacheco, supra:

> Every presumption is to be indulged in favor of the validity and regularity of legislation, and it will not be declared unconstitutional, unless the court is satisfied beyond all reasonable doubt that the

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> Legislature went outside the Constitution in enacting it. [Citations omitted.]

Id. at 523.

Since the statute applies equally to all people, and appellant has failed to show that the legislature went beyond the Constitution in enacting this statute, this Court should reject appellant's claim that Section 76-6-412 (1)(b)(iii) is a special law in violation of Article VI, Section 26 of the Constitution of Utah.

POINT III

A SENTENCE WITHIN STATUTORY LIMITS IS NOT EXCESSIVE WHERE THE APPELLANT FAILS TO SHOW CLEAR JUDICIAL ABUSE.

Appellant was found guilty of theft, a third degree felony under Section 76-6-412(1)(b)(iii) Utah Code Annotated (1953), as amended. Section 76-3-203, Utah Code Annotated (1953) provides:

> A person who has been convicted of a felony may be sentenced to imprisonment for an indeterminate term as follows. . .
> (3) In the case of a felony of a third degree, for a term not to exceed five years . . .

Furthermore, Section 76-3-301, Utah Code Annotated (1953) states:

> A person who has been convicted of an offense may be sentenced to pay a fine not exceeding:
> (2) $5000.00 when the conviction is of a felony of the third degree.

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Lastly Section 76-3-201(3)(a) Utah Code Annotated (1953) states:

> When a person is adjudged guilty of criminal activities which have resulted in pecuniary damages, in addition to any other sentence it may impose; the court may order that the defendant make restitution to the victim.

Appellant contends that the sentence of the court was excessive and arbitrarily and prejudicially imposed. However under applicable Utah law, the appellant was sentenced within the limits imposed by statute. Respondent asserts that absent a showing of judicial abuse, a sentence within statutory limits is neither excessive nor arbitrary. Appellant has failed to show any judicial abuse, therefore respondent respectfully asks this Court to affirm the trial court's sentence.

In State v. Harris, 585 P.2d 450 (Utah 1978), the appellant pled guilty to a reduced charge in anticipation of probation. The trial judge refused to allow him to withdraw his guilty plea and instead sentenced him. Although the issues on appeal differed from those in the instant case, this Court in Harris pronounced the general rule with regard to sentencing:

> Upon conviction of a crime, whether by verdict or by plea, the matter of the sentence to be imposed rests entirely within the discretion of the court,

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within the limits prescribed by law.

Id. at 453 (Emphasis added.)

This statement is in accord with the majority of jurisdictions. The Idaho Supreme Court in State v. Ward, 569 P.2d 916 (Idaho 1977), stated:

> This court has long held that sentencing is generally within the trial court's discretion and will not be disturbed on appeal unless a clear abuse of discretion is shown, and that ordinarily there is no abuse of discretion where the sentence is within its statutory limit.

Id at 920. (Emphasis added.) See also Hanson v. State, 590 P.2d 832 (Wyoming 1979); State v. Whitehead, 596 P.2d 370 (Ariz. 1979).

The appellant has failed to meet his burden of showing that the trial judge clearly abused his discretion. State v. Seifart, 597 P.2d 44 (Idaho 1979). The statement by the trial judge that he wanted to make an example of appellant, cannot be viewed as judical abuse. As was stated in People v. McKnight, 588 P.2d 886 (Colorado App. 1978):

> Punishment of an offender, protection of society, and rehabilitation of an offender are not the only reasons for incarceration; deterrence of similar acts by others is also a consideration. [Citations omitted.]

Id. at 888 (emphasis added).

Similarly in State v. Adams, 577 P.2d 1123 (Idaho

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1978), the Idaho Supreme Court affirmed the appellant's sentence saying:

> The district court acknowledged that the sentence would be of no rehabilitative value to the defendant, but nevertheless imposed the two year period of incarceration in order to deter others from committing similar offenses. General deterrence is one of the several objectives of criminal punishment and has been held to be a sufficient reason for imposing a prison sentence. [Footnotes omitted].

Id. at 1124 (emphasis added).

The appellant was found guilty of a third degree felony and was sentenced within the limits prescribed by law. Consequently, absent a showing of clear judicial abuse, this sentence should be affirmed. Appellant has failed to show any abuse by the trial judge. Furthermore, the mere fact that the sentence may be harsh does not make it an abuse of discretion. Finally it should be noted that although a third degree felony carries the possibility of five years imprisonment and a maximum fine of $5000.00, the appellant's prison sentence was suspended, and probation imposed. Appellant should not be heard to challenge his punishment as excessive when it falls far below the maximum possible penalty.

For the aboveforementioned reasons, respondent respectfully asks this Court to deny appellant's claim and to affirm the trial court's sentence.

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CONCLUSION

Respondent submits that the foregoing points and authorities support the constitutionality of Section 76-6-412 (1)(b)(iii) Utah Code Annotated (1953), as amended, and the actions of the trial court in sentencing the appellant. Therefore, respondent respectfully asks this Court to affirm the appellant's conviction and sentence.

Respectfully submitted,

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