

1981

State of Utah v. Caral Lee Owens and Rudell Owens : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

:
STATE OF UTAH, :
:
Plaintiff-Appellant, :
:
-vs- : Case No.
:
CARAL LEE OWENS and RUDELL : 17038
OWENS, :
:
Defendants-Respondents. :
:

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE FOURTH
JUDICIAL DISTRICT COURT, IN UTAH COUNTY,
STATE OF UTAH, THE HONORABLE
ALLEN B. SORENSEN, JUDGE.

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-vs-

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TABLE OF CONTENTS

	PAGE
STATEMENT OF THE NATURE OF THE CASE -----	1
DISPOSITION IN THE LOWER COURT -----	1
RELIEF SOUGHT ON APPEAL -----	2
STATEMENT OF FACTS -----	2
ARGUMENT	
POINT I: ACTS OF THE UTAH LEGISLATURE ARE ENTITLED TO A STRONG PRESUMPTION OF VALIDITY -----	3
POINT II: "GLOSS DEVIATION" FROM THE AGREEMENT IS A PHRASE COMMONLY USED IN MODERN PENAL STATUTES WHICH PROSECUTE THE UNAUTHORIZED EXERCISE OF CONTROL OVER RENTAL PROPERTY AND SUCH STATUTES HAVE BEEN UPHOLD IN OTHER JURISDICTIONS -----	4
POINT III: THIS COURT HAS ENDORSED THE "GROSS DEVIATION" LANGUAGE BY APPLYING IT IN THE CONTEXT OF UTAH'S NEGLIGENCE STATUTE -----	7
POINT IV: "GROSS DEVIATION" IS A JUSTICIABLE PHRASE, CALCULATED TO GIVE A PERSON OF ORDINARY INTELLIGENCE A REASONABLE OPPORTUNITY TO KNOW WHAT IS PROHIBITED -----	9
CONCLUSION -----	13

TABLE OF CONTENTS
(cont'd)

PAGE

CASES CITED

Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294 (1972) -----	9
People v. Lafler, 393 N.Y. 2d 484 (1977) -----	5
People v. Rici, 410 N.Y.S. 2d 619 (1978) -----	5
State v. Boyd, 560 P.2d 689 (Or. App. 1977) -----	5
State v. Chavez, 605 P.2d 1226 (Utah, 1979) -----	8
State v. Craney, 381 A.2d 360 (Me. 1978) -----	5
State v. Geurts, 350 P.2d 12 (1961) -----	4
State v. McElhaney, 579 P.2d 328 (Utah, 1978) -----	8
State v. Murgatroy, 349 A.2d 600 (N.H. 1975) -----	5
State v. Nielsen, 19 Utah 2066, 426 P.2d 13 (1967) -----	3
State v. Packard, 250 P.2d 651, (1952) -----	3
United States v. Harriss, 347 U.S. 612, 74 S.Ct. 808 ---	10

STATUTES CITED

Utah Code Annotated Section 76-2-103 -----	7,8
Utah Code Annotated Section 76-2-103(3) -----	8
Utah Code Annotated Section 76-2-103(4) -----	8
Utah Code Annotated Section 76-6-410(b) -----	1,2,4,7 13,14
Utah Code Annotated Section 76-17-5 -----	11,13

OTHER AUTHORITIES CITED

Comment, Me. C.C. 17-A., Section 360 -----	12,13
O.R.S. - 164-135(1)(c) -----	6
N.Y.P.L. Section 165.05 -----	12

IN THE SUPREME COURT OF THE
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STATE OF UTAH, :
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 Plaintiff-Appellant, :
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 -vs- : Case No. 17038
 :
 CARAL LEE OWENS and RUDELL :
 OWENS, :
 :
 Defendants-Respondents. :

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

An Information filed against defendants Caral Lee Owens and Rudell Owens was quashed when Judge Allen B. Sorensen determined that the charging statute, Section 76-6-410(b), Utah Code Ann., (1953), as amended, was unconstitutionally vague.

DISPOSITION IN THE LOWER COURT

On March 28, 1980, the State of Utah filed an Information against the defendants for violating Section 76-6-410(b), Utah Code Ann., (1953), as amended, and they were arraigned in the Fourth Judicial District Court, Utah County. Defendants entered pleas of not guilty at the time and counsel for the defense was

April, 1980, counsel for the defense filed a Motion to Quash. A hearing was held before the Honorable Allen B. Sorensen, Fourth Judicial District Court, in and for Utah County, State of Utah, on April 4, 1980. The matter was argued, the Court took the matter under advisement and on that same date granted respondents' Motion to Quash.

RELIEF SOUGHT ON APPEAL

The State of Utah respectfully moves this Court to reverse the decision of the Fourth Judicial District Court and find that Section 76-6-410(b), Utah Code Annotated is not unconstitutionally vague.

STATEMENT OF FACTS

This appeal is from a final order issued on April 4, 1980, by Judge Allen B. Sorensen in the Fourth Judicial District Court, Utah County, granting respondents' Motion to Quash. That Court erroneously concluded that the language "gross deviation from the agreement" in the charging statute was unconstitutionally vague.

The Information originally filed in this action charged respondents Caral Lee Owens and Rudell Owens with violating Section 76-6-410(b), Utah Code Annotated - theft by person having custody of property pursuant to repair to rental agreement. The State was prepared to present evidence showing that on May 18, 1979, the respondents signed an agreement with James Butterfield

of Provo to rent from him a 16-foot trailer for a period of one month. On June 22, 1979, respondents rented another trailer again for a one-month period, but at the end of the month, rather than return the trailer, respondents phoned Mr. Butterfield and asked if they could keep the trailers for another month. He consented, but told them to send him some money to cover the rental period. They agreed to send him the money. The money never arrived and Mr. Butterfield did not hear from respondents again. In December of 1979, the respondents were picked up in another state and the trailers recovered.

ARGUMENT

POINT I.

ACTS OF THE UTAH LEGISLATURE ARE
ENTITLED TO A STRONG PRESUMPTION
OF VALIDITY.

The Utah Supreme Court, in State v. Nielsen, 19 Utah 2066, 426 P.2d 13 (1967), set forth the following as preliminary consideration:

The general rule of statutory construction is to hold an enactment of the legislature valid unless it clearly appears to violate some provision of the Constitution of this State or of the United States.
See 16 C.J.S. Constitutional Law, 99.

Further, in State v. Packard, 250 P.2d 651 (1952):

It is necessary that statutes should not be declared unconstitutional if there

is any reasonable basis upon which they may be sustained as falling within the constitutional framework . . . and that a statute will not be held void for uncertainty if any sort of sensible, practical effect may be given it.

And finally, in State v. Geurts, 350 P.2d 12 (1961):

. . . our conclusion is reinforced by the well known precept that any doubts must be resolved in favor of constitutionality.

The doctrine of "void for vagueness" has evolved as the product of wisdom in search of ways to preserve human dign. There is, in this case, no claim that a constitutional right of the defendant has been violated; no freedom of speech or religion violations; no freedom of association violations or of violations specifically guaranteed rights. Certainly the statute which serves as the legal basis for the information against defendant is not subject to ambiguous interpretation.

POINT II:

"GROSS DEVIATION" FROM THE AGREEMENT IS A PHRASE COMMONLY USED IN MODERN PENAL STATUTES WHICH PROSECUTE THE UNAUTHORIZED EXERCISE OF CONTROL OVER RENTAL PROPERTY AND SUCH STATUTES HAVE BEEN UPHeld IN OTHER JURISDICTIONS.

Oregon, New Hampshire, Maine and New York all have theft statutes that closely resemble Section 76-6-410, Utah Code Annotated. A common element of each state's statute is that a "rentor" can be held criminally liable for using rented property even where the property was once held pursuant to a valid agreement if: 1) the "rentor" intentionally withholds possession of the property; 2) without the consent of the owner; and 3) that unauthorized retention of possession constitutes a "gross deviation" from the rental agreement. High

courts in each of the states have recently considered cases involving violations of their unauthorized use of rental property statute and none have held the "gross deviation" language to be unconstitutionally vague.

Both the Maine and the New Hampshire Supreme Courts have recently decided cases that involved theft of rented property. Although the constitutionality of the language in the statute was not an issue, neither Court had difficulty applying the statute. State v. Craney, 381 A 2d 630 (Me 1978), State v. Murgatroy, 349 A 2d 600 (NH 1975).

The New York Supreme Court has had several opportunities to directly consider the "gross deviation" language and has never found the term too vague to apply to specific fact settings. People v. Lafler, 393 NY 2d 484 (1977), People v. Ricci, 410 NY S 2d 619 (1978). In each of these cases, the Court specifically dealt with violations of the statute that would require an application of the "gross deviation" standard. In neither instance did the Court confront any difficulties applying the statute so as to justify labeling the phrase unconstitutionally vague.

The only state Court that has specifically confronted the issue whether "gross deviation from the agreement" is unconstitutionally vague is the Court of Appeals of Oregon. In State v. Boyd, 560 P2d 689 (On. App. 1977), the lower Court

in Multnomah County held that O.R.S. 164-135(1)(c) was unconstitutionally vague. The State appealed and the Court of Appeals of Oregon reversed, finding that the statute was not unconstitutionally vague. That statute provided:

(1) A person commits the crime of unauthorized use of a vehicle when:

(a) He takes, operates, exercises control over, rides in or otherwise uses another's vehicle, boat or aircraft without the consent of the owner; or

(b) Having custody of a vehicle, boat or aircraft pursuant to an agreement between himself or another and the owner thereof whereby he or another is to perform for compensation a specific service for the owner involving the maintenance, repair or use of such vehicle, boat or aircraft, he intentionally uses or operates it, without the consent of the owner, for his own purpose in a manner constituting a gross deviation from the agreed purpose; or

(c) Having custody of a vehicle, boat or aircraft pursuant to an agreement with the owner thereof whereby such vehicle, boat or aircraft is to be returned to the owner at a specified time he knowingly retains or withholds possession thereof without consent of the owner for so lengthy a period beyond the specified time as to render such retention or possession a gross deviation from the agreement.

Despite appellant's arguments to the District Court, that the "gross deviation" language is unconstitutionally vague there is no support for that conclusion in the decisions of the other states with similar statutes. On the contrary, the

language at issue has provided a fair and workable standard by which to determine the criminal nature of specific conduct.

POINT III:

THIS COURT HAS ENDORSED THE "GROSS DEVIATION" LANGUAGE BY APPLYING IT IN THE CONTEXT OF UTAH'S NEGLIGENCE STATUTE.

Section 76-2-103, Utah Code Annotated provides:

(3) Recklessly or maliciously, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

(4) With criminal negligence or is criminally negligent with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from the actor's standpoint. (emphasis added).

The language "gross deviation from the standard of care that an ordinary person would exercise" and that in Section 76-6-410(b) are remarkably similar. Both contemplate an expected standard of activity and a departure from that

expectation sufficient to constitute a gross deviation. Several times, in recent years, this Court has decided cases involving the "gross deviation" language of Section 76-2-103. In each instance, this Court has demonstrated that a trier of fact could and did determine whether conduct of the defendant so varied from the accepted standard of performance as to constitute a "gross deviation." In none of these cases did this Court find that applying the term resulted in a denial of constitutional rights.

State v. McElhaney, 579 P.2d 328 (Utah, 1978), was an appeal from a judgment of the Fifth District Juvenile Court, Grand County, finding defendant guilty of aggravated assault. This Court affirmed the conviction. Reaching that decision, the Court specifically discussed the language of Section 76-2-103(3), holding that the evidence supported defendant's conviction. In State v. Chavez, 605 P.2d 1226 (Utah, 1979), this Court reversed the defendant's conviction of automobile homicide and remanded with directions to instruct the jury on criminal negligence as the term is defined in Section 76-2-103(4) rather than mere simple negligence. In reaching that conclusion, this Court reasoned that the "gross deviation" language required a higher degree of culpability than simple negligence implied:

Section 76-2-103(4) . . . requires proof
that defendant's conduct placed another at

risk; that the risk be substantial and unjustifiable; and that failure to perceive the risk constitutes a gross (emphasis added by the Court) deviation from the reasonable man's standards. A higher level of culpability required under Section 76-2-103(4) than that defined in Instruction 18 (simple negligence).

This Court's frequent application of the "gross deviation" language in defining negligence directly rebuts appellant's argument that the term is unconstitutionally vague. The term is a useful and practical standard by which the trier of fact can determine whether given conduct so far departs from a required course of action as to require imposition of criminal liability.

POINT IV:

"GROSS DEVIATION" IS A JUSTICIABLE PHRASE, CALCULATED TO GIVE A PERSON OF ORDINARY INTELLIGENCE A REASONABLE OPPORTUNITY TO KNOW WHAT IS PROHIBITED

Defendants' brief asserts that the charging language of the information is so vague in defining the prohibited acts that it denies the defendants due process of law in violation of the test delineated by the Supreme Court in Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294 (1972), In that case,

the United States Supreme Court concluded that a constitutional proper statute must:

(1) "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." (2) prevent "arbitrary and discriminatory enforcement" by providing explicit standards for those who apply the law, and (3) not inhibit the exercise of a person's First Amendment freedoms.

The facts alleged by the state, if proven, would appear to clearly constitute, as a matter of law, acts that a person of ordinary intelligence would know to be criminal and prohibited. The criminal acts in the area of rental property and rental agreements constitute such a wide range of possible fact situations that the only sensible method of defining the criminal activity is to use a general phrase of common understanding such as "gross deviation." Anything short of such an approach would present the risk of imposing criminal sanctions for a mere technical violation of a specific legal tenet in connection with a set of circumstances that are not criminal in nature when viewed in their totality. The "gross deviation" language merely assists the trier of fact in determining whether or not a criminal intent was formulated and a criminal act committed.

In United States v. Harriss, 347 U.S. 612, 74 S.Ct. 808, the U.S. Supreme Court stated:

. . . On the other hand, if the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague even though marginal cases could be put where doubts might arise . . . and if this general class of offenses can be made constitutionally definite by a

reasonable construction of the statute, this Court is under a duty to give the statute that construction.

Section 76-6-410(b), is a recodification of the former section 76-17-5, which read:

Every person who has leased or rented a motor vehicle, trailer, appliance, equipment, tool, or other valuable thing, and who willfully fails to return the same to its owner within ten days after the lease or rental agreement has expired is guilty of embezzlement.

The major difference between the above statute and Section 76-6-410(b) is that the latter imposes criminal liability only upon a finding that the intentional failure to return the property as promised constitutes a "gross deviation" from the agreement. The earlier statute provided that mere willful failure to return the property within ten days after the agreement has expired was a crime. Obviously, the legislature intended to allow the trier of fact the opportunity to look at more than just the time of delay before reaching a decision as to the criminal nature of the breach. The comments regarding similar provisions in the Codes of other states are helpful in determining the rationale behind such a change.

Recently the New York State Legislature provided a minimum standard of "gross deviation" from the agreement. That standard was intended to include, but not be limited to, situations where:

. . . a person who having had custody of a vehicle for a period of fifteen days or less pursuant to a written agreement retains possession of such vehicle for at least seven days beyond the period specified in the agreement and continues such possession for

a period of more than two days after service or refusal of attempted service of a notice in person or by certified mail at an address indicated in the agreement stating (i) the date and time at which the vehicle was to have been returned under the agreement; (ii) that the owner does not consent to the continued withholding or retaining of such vehicle and demands its return. . . . (N.Y.P.L. Section 165.05).

Although the New York Legislature retained the "gross deviation" language, the fact that it had provided a minimum standard concerned some commentators. Aware that the Courts of that state had successfully been applying the statute in the past, Arnold D. Hechtman expressed misgivings about the wisdom of providing a static measure when the statute as worded allowed the courts to consider all the circumstances surrounding a breach of an agreement before concluding that that breach rose to the level of a crime:

Being cast in terms of a flat definition of gross deviation rather than as a presumption of gross deviation, the statute has now been burdened with a degree of inflexibility that may make it difficult for the trier of the facts to assess each case of overtime retention on its own peculiar facts. It is to be noted that only the short-term (i.e., over 15 days) rentals or from other forms of agreements involving bailments with respect to an automobile, is subject to this definition. (Arnold D. Hechtman, Supplementary Practice Commentary to N.Y.P.L. Section 165.05).

The comments following Title 17-A Section 361 of the Maine Criminal Code indicate that the "gross deviation" language attacked by defendants as unconstitutional, was intended to

provide increased fairness and due process for a person accused of theft of rented property. The comments state:

Subsection 1, paragraph B is designed to reach the garage mechanic who uses a vehicle left for repair as his own personal means of transportation. The use must, however, be more than minor, and must constitute a "gross deviation" from the basic reason for the vehicle having been left to him. It is necessary to have some limit of this sort on the criminal liability created by this section, and the "gross deviation" limit serves to create a jury question on the issue so that all of the circumstances can be taken into account. (Comment, Me. C.C. 17-A, Section 360).

Although defendant argues that the language of Section 76-6-410(b) denies him due process of law, the apparent intent of the legislature and the effect of the statute is to do exactly the opposite. Under the former 76-17-5, a person could be found guilty of committing a crime for a mere ten-day delay in returning the rented property. The present statute allows the trier of fact to consider all of the circumstances surrounding the failure of the defendant to return the rental property. If the failure to return does not constitute a "gross deviation", then the defendant is not criminally liable. Section 76-6-410(b) thereby provides a more fair and rational basis upon which to determine criminal liability in given circumstances than did its predecessor.

CONCLUSION

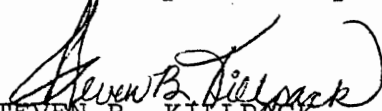
A "gross deviation from an agreement" is simply a criminal breach of that agreement. Defendants' arguments that they have been denied constitutional rights is without merit. The phrase is not unconstitutionally vague; contrarily, the phrase provides a person of ordinary intelligence a reasonable opportunity to know what is prohibited. Such language has been upheld by the Court of other states in criminal statutes regarding rental property and has been used and upheld in Utah in connection with statutes involving criminal negligence.

For these reasons, the State respectfully requests that this Court find that Section 76-6-410(b), Utah Code Annotated, is not unconstitutionally vague and reverse the decision of the Fourth Judicial District Court, Utah County.

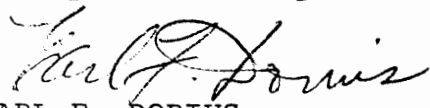
RESPECTFULLY SUBMITTED,



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CERTIFICATE OF MAILING

Mailed two copies of the foregoing Brief of Appellant to Mr. Sheldon Carter, Attorney for Respondent Caral Owens, 350 East Center, Provo, Utah 84601; and to Mr. Gregory Warner, Attorney for Respondent Rudell Owens, 107 East 100 South, No. 29, Provo, Utah 84601, this 12th day of May, 1981.